

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

ST/00081/2006

[Arising out of Order-in-Appeal No.87/2005-ST, dated 28.10.2005 passed by the Commissioner of Central Excise (Appeals), Coimbatore]

M/s. JET AIRWAYS (INDIA) LTD.

APPELLANT

Versus

COMMISSIONER OF CENTRAL EXCISE, COIMBATORE

RESPONDENT

ST/00082/2006

[Arising out of Order-in-Appeal No.87/2005-ST, dated 28.10.2005 passed by the Commissioner of Central Excise (Appeals), Coimbatore]

COMMISSIONER OF CENTRAL EXCISE, COIMBATORE

APPELLANT

Versus

M/s. JET AIRWAYS (INDIA) LTD.

RESPONDENT

Appearance:

For the Assessee
For the Revenue

Shri Gopal Mundhra Consultant
Shri K.P. Muralidharan, AC (AR)

CORAM:

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

Date of hearing / decision : **18.09.2017**

FINAL ORDER NO. 42146-42147/2017

Per Bench

Jet Airways India Ltd. (hereinafter referred to as "assessee") is engaged in the business of air transportation. It appeared to the department that —



- (i) Assesseees are providing Cargo Handling Services incidental to Freight;
- (ii) Charges collected by assessee for transporting domestic cargo i.e., Freight, airway bill charges, valuation charges, due carrier charges, charges collect fees and demurrage charges are for Cargo Handling Charges incidental to freight;
- (iii) Charges for trading and unloading are in-built in the aforesaid charges and not separately shown in the airway bills;
- (iv) Since lump sum amount is charged both transportation and cargo handling tax is leviable on entire amount;
- (v) Services provided by assesseees are in the nature of Cargo Handling Services; and
- (vi) Appellants are liable to pay service tax on the composite charges, which comprises of freight handling charges, airway bill charges and valuation charges, which are incidental to the Cargo Handling Service.

Hence, a show-cause notice dated 19.11.2004 was issued to the appellants proposing demand of service tax of Rs.26,03,720/- with interest thereon as also imposition of penalties under various provisions of the Finance Act, 1994.

2. In adjudication, original authority in terms of order dated 09.04.2004, inter alia, upheld service tax demand of Rs.26,03,720/- with interest and equal penalty holding that assessee was liable to pay service tax as a "Cargo Handling Service" provider. Learned adjudicating authority looked into the issue in para 24 and 25 of his order and held that the assessee was liable to service tax as proposed in the show-cause notice.

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3. In appeal, Id. Commissioner (Appeals) concurred with the adjudicating authority but in terms of para-5.2 he did not propose penalty with the observation that there was no intention to cause evasion. While holding so, in para-15 he held that extended period was not invokable. In para 15 (b) (iii) of his order, he held that the service tax demand is confined to "cargo handling service" aspect only and the rest of the services provided as alleged in the SCN shall not be exigible to service tax. He held in his order that the appellant was not liable to service tax on valuation charges, airway bill charges, due carrier charges, charges collect fees and demurrage charges which shall not form part of the assessable value. The reasoning he assigned was that such charges are not connected to and are not in relation to cargo handling service. He further held that the amount liable to service tax should be limited to "Due carrier charges" provided and shown separately and contractors cannot be held liable for the same. Therefore, he required re-quantification of the demand. All these aspects are coming from para-5.2 of the appellate order.

4. Being aggrieved by the order of the Id. Commissioner (Appeals), the assessee came in appeal before the Tribunal (appeal No. ST/81/2006).

5. Revenue being aggrieved by the deletion of other charges from the gamut of taxable services provided by the assessee as held by the Id. Commissioner (Appeals) has come in appeal to Tribunal (appeal No. ST/82/2006). Revenue's further grievance is that Id. Commissioner (Appeals) should not have exonerated the assessee from penalty.

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6. It is the submission of the assessee, through learned counsel Shri Ahok Yadav, that it was not a cargo handler but it was a mere transporter of luggage of the passengers delivered at the checking point or collected from different points engaging contractors. A sample copy of the agreement dated 30.12.2004 was submitted to plead that the contractors were responsible to collect the cargo and inform the same to the appellant for transportation. Assessee being a mere transporter, it should not be held to be a cargo handling service provider. Placing a copy of the insurance agreement, it is the submission of the appellant that what that was cargo was insured in terms of section 2 of the insurance coverage. According to the appellant clause 2 of section 2 of the insurance cover deals with the coverage of insurance and most particularly clause 2.1.4 is in this regard.

6.2 It is further submission of the assessee that when it was only a transporter, it should not be called as a cargo handler following the decision of the Tribunal in the case of the same assessee reported in *2010 (17) STR 94 (Bangalore)*. Similarly, Bangalore Bench while deciding the issue has followed Ahmedabad Bench decision reported in *2008 (11) STR 645 (Tri.-Ahmd.)*. That was also relied upon by the appellant. According to assessee, in para-4 of the Ahmedabad Bench decision there is an observation that the activity undertaken by the appellant was transportation of cargo. Similarly, in para-5, the Bench has noticed that the assessee were admittedly not providing any cargo handling services to the public at large and as such, are not perceived to the trade or public as a cargo handling agent. The Bench further relied on the Board's Circular F.No. B-11/1/2002-TRU dated



01.08.2002 to hold that the assessee had not acted like Container Corporation of India, Airport Authority of India, Inland Container Depot, Container Freight Stations, etc. It is therefore not a cargo handler and not providing cargo handling service.

6.3 Placing the Board's Circular No. 80/2004 dated 17.09.2004 [Ref.: "Exhibit 'H" at page 75 of the appeal folder] learned advocate says that the service provided for export of cargo is out of the ambit of Service Tax, once that was clarified by the Board as per the provisions made in Finance Bill, 2004.

6.4 Learned advocate further relies on the decision of the Mumbai Bench of the Tribunal in the case of *United Shippers Ltd. Vs. CCE, Thane - 2015 (37) STR 1043 (Tri.-Mum.)* to reiterate their stand that the assessee acted as a mere transporter of the passenger baggage and was not a cargo handling service provider. He also submitted that the lateral entry enacted in law imply that the earlier entry of cargo handling was not covering the scope of the lateral entry. Therefore the assessee should not be brought into the scope of tax by any stretch of imagination. The decision of the Bombay Bench in favour of the assessee was affirmed by the Apex Court as reported in 2015 (39) STR 1369 (S.C.)

7. On behalf of Revenue, Ld. DR submits that the Id. Commissioner (Appeals) has made a thorough enquiry of the issue and he dealt in para 5.1.2 what is meant for taxation. He stated that the issue before him was to decide whether the service of the nature described in the SCN amounted to cargo handling service. In para 5.1.1. of his order while holding so he reached to the conclusion that



the service tax is payable by the appellant on the cargo handling service. But he committed error in law to exclude various other charges like valuation charges, airway bill charges, due carrier charges, charges collect fees and demurrage charges from the purview of value of taxable service. That has aggrieved Revenue. So also in para 5.4 as well as in para 5.2 he held that although the extended period is invokable there should not be penalty leviable on the assessee. Revenue is on both counts of the order of the Id. Commissioner before Tribunal.

8. Heard both sides and perused the records.

8.1 As per the provisions of sub-section (23) of section 65 of the Finance Act, 1994, "Cargo Handling Service" means loading, unloading, packing or un-packing of cargo and includes Cargo Handling Services provided for freight in special containers or for non-containerized freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport and Cargo Handling Service incidental to freight, but does not include handling of export cargo or passenger baggage or mere transportation of goods.

8.2 Under the provisions of section 65(105)(zr) of the Finance Act, 1994, the services provided by a Cargo Handling Agency, in relation to cargo handling is liable to service tax. As per Board's clarification under Circular F.No.B 11/1/2002-TRU, dated 01.08.2002, if a lump sum amount is charged for both transportation and cargo handling, the tax is leviable on the entire amount. On the other hand, if the Airway bill indicates the amount charged for cargo handling and transportation separately on actual basis (verifiable by documentary evidence), then the tax is leviable only on the cargo handling charges."



8.3 The assessee's main contention is that the services rendered by them are of transportation only and not "Cargo Handling Services". They contend that the contract is to "transport the goods" and not to provide "Cargo Handling Services". They argue that for transport of goods, they have to be loaded or unloaded. However, the same does not mean that every transporter would be subject to service tax under Cargo Handling Services. Assessee also points out that loading and unloading was done by independent contractors and they have themselves not neither undertaken nor performed the activity of loading or unloading.

8.4 From the definition of "Cargo Handling Service", what emerges is that mere transportation of cargo is excluded from that definition. Every activity of service of transportation of goods will surely include some manner of loading and unloading of the goods. The question to be asked is whether such loading/unloading is the primary activity involved in the services carried out. From the facts of the matter at hand, we find that the answer is in the negative.

8.5 It is further seen that the assessee themselves do not carry out even these peripheral activities of loading or unloading. The same is carried out instead by independent contractors. Throughout this exercise "due carrier charges" are collected by the appellants from the clients to defray the cost of carting and x-ray of cargo paid to third parties. This is just a reimbursement of convenience for all parties involved to ensure seamless, prompt and timely services to the clients.

8.6 It is not the case of the department that "due carrier charges" are retained by the appellants or that they are not reimbursed to the



contractors who undertake loading/unloading of the cargo to /from the aircraft etc.

8.7 The Board's Circular dt. 17.09.2004 was issued for the purpose of conveying Budget changes for 2004-05 effective from 10.09.2004. The said circular, inter alia, conveys that twelve new services have come under the service tax levy, including "Transport of Goods by Air". While explaining the scope of changes, the scope of new service is given in para-6 as follows :

"6. Transport of goods by air

Services provided by an aircraft operator (i.e. commercial concern like an airlines) in relation to transport of goods by an aircraft falls under this category. Thus, in addition to the actual air-freight charges, all charges collected towards storing, handling, loading/unloading (done in relation to air transportation of cargo) by an airlines are also chargeable to this levy."

Recalling the facts of the case at hand, it becomes clear that the activities of the assessee herein would definitely fall within the ambit of the said service, namely, "Transportation of Goods by Air" introduced w.e.f 10.09.2004. However, for the prior period (16.08.2002 to 09.09.2004), the department is seeking to bring the same activities under the fold of cargo handling service. This, in our considered opinion, is not just or fair. Law is well settled that when a new entry is brought under the levy of service tax, the same activity cannot be subjected to levy under an existing entry, unless the new entry has been specifically carved out of the earlier one. This is certainly not the case here.

8.8 We further find that vide the circular dt. 01.08.2002, Board had issued clarifications regarding service tax on cargo handling services. The said circular, inter alia, clarified that liability to tax under



that category would only be services provided by cargo handling agency, undertaking activity of packing, unpacking, loading and unloading of goods meant to be transported by any means of transportation, namely, truck, rail, ship or aircraft. There is no doubt, then, that the transportation is only incidental to the cargo handling service and not the primary activity. On the other hand, the activities sought to be taxed in that cargo handling service is that those of packing, unpacking, loading and unloading of goods. The circular further clarifies that mere transportation of goods is not covered in the category of 'cargo handling' and is therefore not liable to service tax.

8.9 Viewed in this light, the transportation of goods by air will firstly not be taxable under cargo handling service and secondly said activity would attract service tax levy only from 10.09.2004, and that too under "Transport of Goods by Air". This being so, we are of the considered opinion that the demand of service tax on the assessee under cargo handling therefore does not have legal basis and will therefore have to be set aside.

9.1 Having arrived at these conclusions, we find further sustenance in the ratio of the following decisions:

9.2 In the case of *Jet Airways (India) Ltd. Vs CST, Ahmedabad* reported at 2008 (11) S.T.R.645 (Tri.-Ahmd.), it was held as under:

“After hearing both sides, we find that the appellant is admittedly an Airline engaged in the business of transportation of passenger and cargo. For the said purpose, the appellant takes booking of the cargo which is to be transported either by himself at its booking office or through IATA agents appointed at various locations all over the country. The cargo booked by the cargo agents are directly transported by the cargo agents to the warehouse at the Airport for uplift to the destination through the Airlines of the appellants. The loading/unloading activity is done by M/s. Philipson Corporation in terms of agreement entered into between the two. The cargo which is unloaded at the destination is transported to warehouse of the appellant and the consignee/agent of the consignor collect the cargo from the warehouse of the appellant. The appellant neither collects the cargo from the consignor premises nor deliver the same to the consignee of the cargo. The activity undertaken by them is transportation of the cargo from its air cargo station at source location to its air



cargo station at destination location, for which the charges as detailed in the preceding paragraph are received by them.

The definition of cargo handling services as appearing in Section 65(105)(zr) - "Taxable service" means any service provided or to be provided to any person, by a cargo handling agency in relation to cargo handling services".

From the above it becomes clear that services to be taxed under the said heading are to be provided by cargo handling agency and the same must be in relation to cargo handling services. The appellants are admittedly not providing any cargo handling services to the public at large and as such, are not perceived to the trade or public as a cargo handling agent. As observed by the Hon'ble Supreme Court in the case of *Asian Paints India Ltd. v. CC.E.* - 1988 (35) E.L.T. 3 (S.C.), the expression as appeared in the taxing statute should be construed in its popular sense, which means that sense which people conversant with the subject would attribute to it and commercial understanding in respect of the same should be preferred. By applying the above criteria, the appellants are admittedly not understood in the common parlour as a cargo handling agency, inasmuch as they are admittedly airline company. It may not be out of context to observe here that in case the cargo is not booked by the said airline, they would not handle the same and would not indulge in loading/unloading or transporting cargo which is not transported by their airline. The contract entered into between the appellant and their customer is not for rendering cargo handling services but is for transportation of the appellant's cargo by air for which purpose, they may get cargo collected or delivered at the customer in which case services have to be held as an integral part of the transportation services. In fact, the independent contractor stands appointed by the appellants for handling cargo and therefore, their services are being availed by the appellants. We find from the above order of the Deputy Commissioner that 24 agents stand appointed by the appellants through which cargo is booked and all the charges are collected by the said agent, who deduct their commission and pay the balance to the appellant. The said finding of fact does not stand rebutted by the Revenue. It is also seen that where cargo is directly booked by the airline, they collect charges from the customer directly. It stands correctly held by the Deputy Commissioner that such services cannot be held to be cargo handling services. As rightly observed by the Deputy Commissioner, the primary duty of every transport operator i.e. road, rail or airport to provide facilities of packing/unpacking, loading/unloading of goods to the customer for promotion of business, and if all these services are covered under the category of 'cargo handling services, it will create a preposterous situation for the department, where each and every transport operator such as Railways, Roadways would be covered under cargo handling services and the new services of transport of goods by the Air or Road will become redundant as transport of goods cannot be envisaged without loading/unloading.

We also further note that the Board circular issued by F.No.B2/8/2004-TRU dated 10-9-2004 in the case of "transport of goods by air Services" explains - In addition to the actual air freight charges, all charges collected towards storing, handling, loading, and unloading (done in relation to air transportation of cargo) by an airlines are also chargeable to this levy. Therefore, it can be said that such services of loading/unloading provided by the Airlines were not covered under the cargo handling services, otherwise, there would have been no need to issue the clarification regarding levy of service tax in respect of services provided in the category of 'transportation of goods by air'.

At this stage, we also take note of the Tribunal decision in the case of *Dr. Lal Path Lab (P) Ltd. v. C.C.E., Ludhiana* - 2006 (4) S.T.R. 527 (Tri.-Del.) in which case, the dispute related to the appellant activity of collection of samples would amount to business auxiliary service or not, and the stand of the Revenue rejected by the Tribunal by observing that drawing of sample and processing and forwarding of such samples are not in the same genre as any of illustrative services under serial No. (iv). By applying the same reasoning, we hold that the incidental service of collection of cargo for the purpose of transportation cannot be held to be falling under the cargo handling service.



We also note that the Board circular F. No. B-11/1/2002, dated 1-8-2002 while detailing cargo handling agent's case for example, service provider as Container Corporation of India, Airport Authority of India, Inland Container Depot, Container Freight Stations. Said list which is though illustrative and not exhaustive refers to service provider but actually perform such services and there is no reference to any of the airlines who undertake transportation of the goods. Taking the clue from the above, it has to be held that the services, if any, provided by the airlines for transportation of the cargo from one place to another cannot be covered under the category of cargo handling service. If the said services are held to be cargo handling or any trader or shopkeeper who is mainly engaged in the same product may also undertake to the bought out items the same at the customer door step would be held as cargo handling agents.

We also agree with the appellant's contention that once the new entry is introduced with effect from the date without disturbing already existing entries, it has to be held that the new entry was not covered by the previous entry. The reference in this regard is made to the Tribunal decision in the case of *Board of Control For Cricket in India v. C.S.T., Mumbai - 2007 (7) S.T.R. 384 (Tri.-Mumbai).*"

9.3 The above decision was followed in the case of *Jet Airways (India) Pvt. Ltd., Vs Commissioner of Central Excise, Hyderabad* reported in 2010 (17)S.T.R. 94 (Tri.-Bang.).

9.4 In a recent decision, in the case of *United Shippers Ltd. Vs Commissioner of Central Excise, Thane-II* reported in 2015 (37) S.T.R. 1043 (Tri.-Mumbai) the ratio of the *Jet Airways* decision, cited supra was relied upon by the Tribunal to hold that transport of coastal goods cannot be taxed under categories of "Cargo Handling Service."

"The next issue for consideration is whether coastal transportation of goods could be levied to Service Tax under cargo handling service prior to 6-7-2009. Transport of coastal goods and goods transported through inland water came under the purview of Service Tax levy vide Finance Act, 2009, with effect from 6-7-2009. Vide notification No. 30/2009-S.T., dated 31-8-2009 transport of coastal goods in respect of items specified in the Table annexed thereto were exempt from Service Tax. The appellant herein undertook coastal transportation of fertilizers, which is one of the items specified in the notification as eligible for exemption. Revenue is seeking to confirm Service Tax demand under the category of cargo handling service. It is a settled position in law that when a new entry is brought under Service Tax levy, the same activity cannot be subjected to levy under an existing entry unless the new entry is carved out of the existing entry as held by the Hon'ble Bombay High

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Court in the case of *Indian National Shipowner's Association* [2009 (14) S.T.R. 289 (Bom.)]. Therefore, there cannot be any demand for Service Tax on coastal transportation of goods prior to July, 2009. Further, the goods transported by the appellant is also covered by Notification 30/2009-S.T. In this factual and legal scenario, the demand of Service Tax under the category of cargo handling service has to be set aside especially when the activity is squarely covered under the entry of coastal transportation of goods and we hold accordingly."

9.5 The Tribunal decision in *United Shippers Ltd.* was appealed against by the department and the same was dismissed by the Hon'ble Supreme Court as reported in *2015 (39)J369 (S.C.)*. The operative portion of the order is as follows:-

"Delay condoned.

These appeals are directed against the judgment and order passed by the Customs, Excise & Service Tax Tribunal, West Zonal Bench at Mumbai in Order No.A/1626-1630/2014-WZB/C-I(CSTB) in ST/85933,86857-86859 and 87814/2013-Mum., dated 16.10.2014.

We have heard Shri Mukul Rohatgi, learned Attorney General appearing for the appellant and carefully perused the material available on record in our considered opinion, we do not see any good ground to interfere with the judgment and order passed by the Tribunal. Accordingly, the Civil Appeals are dismissed."

9.6 In the case of *Jet Airways (India) Ltd. Vs Commissioner of Service Tax, Ahmedabad* reported in *2008 (11) S.T.R. 645 (Tri.-Ahmd.)*, the Tribunal has held that mere transportation is not covered under "Cargo Handling Service." The relevant portion of the order is mentioned para 4 as follows:-

"After hearing both sides, we find that the appellant is admittedly an Airline engaged in the business of transportation of passenger and cargo. For the said purpose, the appellant takes booking of the cargo which is to be transported either by himself at its booking office or through IATA agents appointed at various locations all over the country. The cargo booked by the cargo agents are directly transported by the cargo agents to the warehouse at the Airport for uplift to the destination through the Airlines of the appellants. The loading/unloading activity is done by M/s. Philipson Corporation in terms of agreement entered into between the two. The cargo which is unloaded at the destination is transported to warehouse of the



appellant and the consignee/agent of the consignor collect the cargo from the warehouse of the appellant. The appellant neither collects the cargo from the consignor premises nor deliver the same to the consignee of the cargo. The activity undertaken by them is transportation of the cargo from its air cargo station at source location to its air cargo station at destination location, for which the charges as detailed in the preceding paragraph are received by them."

10. In view of the discussions hereinabove and also following the ratio of the case laws cited (supra), we are of the considered opinion that the services provided by the assessee cannot be brought under the ambit of Cargo Handling Services. The demand made against the assessee on this score will not sustain and the impugned order will have to be set aside, which we hereby do. Appeal No.**ST/00081/2006** filed by assessee is allowed with consequential relief, if any, as per law. In consequence, Appeal No. **ST/00082/2006** filed by department is dismissed.

(operative part of the order pronounced in court)



(Madhu Mohan Damodhar)
Member (Technical)



(Sulekha Beevi C.S)
Member (Judicial)

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