

IN THE CUSPTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:16.08.2017
Date of Decision:23/08/2017

Customs Appeal No.50483/2017(DB)

[Arising out of Order-in-Original No.158/2016 dated 11.11.2016 passed by the
Commissioner of Customs, IGI Airport, New Delhi]

M/s.InterGlobe Aviation Limited

Appellants

Vs.

CC, New Delhi

Respondent

Appearance:

Rep. by Shri S. Vasudevan, Advocate & Shri Abhinav Jaganathan,
Advocate for the appellant.

Rep. by Shri Govind Dixit, DR for the respondent.

Coram: Hon'ble Shri S. K. Mohanty, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No.56130/2017

Per B. Ravichandran:

The appeal is against order dated 11.11.2016 of Commissioner of Customs, Airport, New Delhi. The appellant is engaged in air transport business both in domestic and international sector. They operate some of their air crafts in domestic sector and continue the service in international sector also. The Aviation Turbine Fuel (ATF) is filled by the appellant for domestic flight operation. When the same aircraft is to embark on an international travel, the ATF in the fuel tank is considered as cleared outside India and when the aircraft returns from foreign trip, the ATF left over/available in the aircraft is considered to be an import item subjected to customs duty as per the applicable rates. The appellants were maintaining accounts of these transactions and at the end of the month, they submitted detailed flight-wise information including customs duty liability,

payment of such duty, flight details including quantity of ATF on which duty has been paid. This practice has been continuing for many years. The dispute in the present case mainly revolves around the valuation of ATF available in the fuel tank of aircraft returning from the foreign trip to continue travel in domestic sector. The appellants were considering the price at which the international Airlines purchases ATF from Indian Oil Corporation. Such price formed the basis of assessable value with addition of 1.125% as insurance charges and 1% as handling charges. The customs duty was discharged by the appellant on ATF available in such aircrafts returning from international trips on a monthly basis, by adjusting from the advance deposit maintained by them with the Department.

2. The Revenue entertained a view that for valuation of ATF available on remnant fuel in the returning aircraft, the appellants are liable to add 20% as notional freight charges in terms of Rule 10(2) of Customs Valuation Rules. The proceedings initiated against the appellant resulted in confirmation of demand of differential customs duty amounting to Rs.9,17,060/- covering the period September, 2011 to March, 2015. A penalty of Rs.5 lakh was imposed on the appellant under Section 112 of the Customs Act, 1962. A penalty of Rs.5 lakh was imposed on the appellant under Section 112 of the Customs Act, 1962.

3. Ld. Counsel appearing for the appellant submitted that the impugned order is not legally sustainable. His main grounds in appeal can be summarized as below:-

(A) No clear procedure has been established for filing bill of entry in the case of ATF. The appellants have been discharging customs duty on a regular basis in respect of remnant ATF imported as part of fuel in the tank. All details have been submitted to the Customs Authorities on a regular monthly

basis. This practice has been continuing for quite sometime. The Ministry vide letter dated 24.4.1971 clarified as to the procedure for discharging duty on left over ATF. Considering the background explained in the said letter, the procedural provisions relating to the duty payment on left over ATF should be construed liberally.

(B) There is no machinery provision laid down to be followed in such situations. In fact, the Mumbai Commissionerate issued detailed procedure for filing bill of entry etc. only on 3.3.2015.

(C) The aircraft carries fuel in the form of ATF. It is part and parcel of the aircraft. There is no transportation of ATF as cargo warranting any notional addition of freight of 20% on such ATF. The fuel to be carried by any aircraft is regulated by the Civil Aviation Authorities. Any aircraft will carry sufficient amount of fuel for its propulsion to the pre-determined destination, with additional quantity as per the safety requirement to meet the contingencies of diversion or delay in landing. In other words, no aircraft carries ATF as an additional cargo to be treated separately for ascertaining freight for adding on the assessable value. Rule 10(2) of Valuation Rules has no application in such situation.

(D) The appellant adopted IOC price, where the identical goods were sold to international flights in India. Apparently, such price includes all the considerations towards freight, landing charges, insurance, etc. No further addition can be

made on such price in terms of Section 14 of the Act. Reliance is placed on the instructions dated 20.10.2006 of Commissioner of Customs, Airport, Mumbai. The said instructions clarified that in absence of invoice of ATF, the price on which Indian Airlines purchases ATF at Mumbai Airport for their international flight should be taken into consideration. There can be no addition in the name of transportation cost for ATF, which is nothing but a propulsion fuel for the aircraft. When the shipping containers and stores are assessed to duty, no separate freight element is added. In fact, when the aircraft itself is imported in its own propulsion, no addition of freight is added to the value of the aircraft. The Appraising Manual while dealing with such import of aircraft in own propulsion clarified that Section 14 value can be arrived without further addition of freight as the aircraft depreciates on such travels.

(E) The appellants are eligible for exemption under notification no.151/94-Cus dated 13.07.2014. The Original Authority denied the concession only on the ground that procedural requirement, like filing of bill of entry, was not followed by the appellant.

(F) No penalty or demand for extended period is sustainable in the present case. The appellants filed all the required particulars at the time of arrival of aircrafts. There is no suppression or willful mis-statement on the part of the appellant. In fact, they maintained advance deposit with the

Customs Authorities against which monthly custom duty liability are adjusted. Complete details of each flight were furnished by the appellant to the Customs Authorities. There is no question of any suppression especially when the said practice of filing monthly details along with payment of duty on such monthly basis has never been questioned for so many years by the Customs Authorities.

5. Ld. AR supported the findings of the lower authorities. He submitted that in terms of Section 2(22), “goods” include stores and fuel also is considered as stores. The import of such fuel when the aircraft returns from international flight, for operation in domestic sectors, is to be assessed to customs duty. Since the freight involved in such transport of ATF from foreign airport to India airport is not ascertainable, the Original Authority is right in adding notional freight of 20% in the valuation of ATF in terms of Rule 10(2) of the Valuation Rules. The appellant did not file the bill of entry at the time of arrival of aircraft and this is a violation of legal requirement attracting penal consequences.

6. We have heard both the sides and perused the appeal records.

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 can not 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**, 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.

9. We also note that as clarified by the Commissioner, Airport, Mumbai vide his instructions dated 20.10.2006 in the absence of invoice for ATF, the price at which Indian Airlines purchase ATF for international flight can be considered for valuation. In such situation, it will not be tenable to add a further notional freight of 20% to arrive at the assessable value. On this ground also, we find the impugned order is not sustainable. Regarding liability of the appellant for penalty under Section 112, we note that the impugned order observed that the appellants failed to follow the procedure of filing bill of entry and valuing the ATF properly. Admittedly, the appellants have been filing details of arrival of aircraft from foreign trip along with quantity of fuel etc. On arrival re-conciliation of quantity of fuel along with duty payable is also submitted. Duty payment is made through adjustment of pre-deposit made with the customs. This practice has been continuing for many years. In such factual position, it is not tenable for the Revenue to take up a decision that there is a violation of procedure and the appellant is liable to penalty under Section 112. We have perused the provisions of Section 112. The Original Authority did not mention under which sub-category of the provisions of Section 112, the appellant is held liable for penalty. There are different types of infringements listed under the section. We note that the Original

Authority concluded that by not following the proper procedure and not calculating the customs duty properly, the appellant evaded customs duty. We find such observation is not legally sustainable in the facts of the case, as discussed above. The procedure followed by the appellant and regularly intimated to the Department has not been varied by the Revenue. No loss of revenue has been alleged except for non-addition of notional freight in the value of ATF. As we have held above, such notional addition is not legally sustainable. In view of these observations, we find there is no sustainable reason for imposing penalty on the appellant under Section 112.

9. In view of the above discussions and analysis, the impugned order is set aside and the appeal is allowed.

[Order pronounced on 23.08.2017.]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.

