CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 87622 TO 87655 OF 2019

[Arising out of Order-in-Appeal No: MUM-CUSTM-AMP-APP-910 to 949/18-19 dated 28TH December 2018 passed by the Commissioner of Customs (Appeals), Mumbai – III.]

Jet Airways India Ltd
Siroya Centre Sahar Airport Road, Andheri East
Mumbai - 400099 … ***Appellant***

versus

Commissioner of Customs (Import)
Air Cargo complex, Sahar, Andheri (East)
Mumbai - 400099 ***…Respondent***

APPEARANCE:

Shri Tarun Govil, Advocate for the appellant

Ms Manisha Goel, Commissioner (AR) with Shri R K Dwivedy, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 87330-87362 & 87370/2021

DATE OF HEARING:	04/10/2021
DATE OF DECISION:	21/12/2021

PER: C J MATHEW

The dispute in these 34 appeals filed by M/s Jet Airways India

Limited, against order-in-appeal no. MUM-CUSTM-AMP-APP-910 to 949/18-19 dated 28th December 2018 of Commissioner of Customs (Appeals), Mumbai – III, has its genesis in the re-import of parts/engines of aircraft sent outside the country for repair and the controversy pertaining to the extent to which the exemption, accorded by notification no. 45/2017-Cus dated 30th June 2017 and no. 46/2017-Cus dated 30th June 2017, applies to the duty liability otherwise payable on assessment. Specifically, it is the coverage of Integrated Goods & Service Tax (IGST) levied under section 3 (7) of Customs Tariff Act, 1975 within the exemption that lies at the core of the cavil of the appellant.

2. The re-imports had been effected against 34 bills of entry filed between 18th August 2017 and 9th August 2018 on which, and despite their claim for exemption, they had been assessed to duty of ₹56,39,37,439 as leviable under the above provision and which had been discharged ‘under protest’ before seeking appellate remedy, and unsuccessfully, leading to the impugning of the order before us. It is the deployment of

> *‘hereby exempts the goods falling within any Chapter of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and specified in column (2) of the Table below when re-imported into India, from so much of the duty of customs leviable thereon which is specified in the said First Schedule, and the whole of the integrated tax, compensation cess*

> *leviable thereon respectively under sub-section (7) and (9) of section 3 of the said Customs Tariff Act, as is in excess of …..*
>
> *….Duty of customs which would be leviable if the value of re-imported goods after repairs were made up of the fair cost of repairs carried out including cost of materials used in repair (whether such costs are actually incurred are not), insurance and freight charges both ways'*

in notification no. 45/2017-Cus dated 30th June 2017 and

> *'hereby exempts the goods falling within any Chapter of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and specified in column (2) of the Table below when re-imported into India, from so much of the duty of customs leviable thereon which is specified in the said First Schedule, and the whole of the additional duty, integrated tax, compensation cess leviable thereon respectively under sub-section(1), (3), (5), (7) and (9) of section 3 of the said Customs Tariff Act, as is in excess of …..*
>
> *….Duty of customs which would be leviable if the value of re-imported goods after repairs were made up of the fair cost of repairs carried out including cost of materials used in repair (whether such costs are actually incurred are not), insurance and freight charges both ways'*

in notification no. 46/2017-Cus dated 30th June 2017 applicable upon re-import of specified goods sent for repair outside the country that prompted the claim for exemption from Integrated Goods & Service Tax (IGST) on value in excess of fair cost of repairs, including cost of materials, insurance and freight. Though the claim for exemption from basic customs duty was also denied by the 'proper officer of customs', the acceptance of entitlement by the first appellate authority has rendered closure to that aspect of the dispute.

3. Learned Counsel for the appellant submits that the issue stands covered by the decision of the Tribunal in *Jet Airways (India) Ltd v. Commissioner of Customs, Air Cargo Commissionerate, New Delhi* [*final order no. 50004-50063/2021 dated 13th January 2021 disposing of appeal no. 54064 to 54082, 54089 to 54100 and 54102 to 54130 of 2018 against order-in-appeal no. CC (A) CUS/de-I/ACC/Import/NCH CH/358-420/2018 dated 12th September 2018 of Commissioner of Customs (Appeals), New Customs House, Delhi*]. It was also contended by him that notification no. 36/2021-Customs dated 19th July 2021 and no. 37/2021-Customs dated 19th July 2021 substituting *'Said duty, tax or cess' for 'Duty of customs'* in column (3) of the Table referred to *supra* and the insertion of

> *'(d) on recommendation of the GST Council, for removal of doubt, it was clarified that the goods mentioned that serial numbers 2 and 3 of the Table, are leviable to integrated tax and cess as leviable under the said Customs Tariff Act, besides the customs duty as specified in the said First Schedule, calculated on the value as specified in column (3), and the exemption, under said serial numbers, is only from the amount of said tax, cess and duty over and above the amount so calculated.'*

in notification no. 45/2017-Cus dated 30th June 2017 and no. 46/2017-Cus dated 30th June 2017 is of questionable jurisdiction as retrospectivity of clarification, under section 25 of Customs Act, 1962, is restricted to one year from the date of the original notification.

4. It is the contention of Learned Authorised Representative that the definition of 'duty' in section 2(15) of Customs Act, 1962 assigns a meaning which, when read in conjunction with section 12 of Customs Act, 1962, precludes differentiation merely owing to distinguishable legislative parentage; according to him, 'duty of customs' in the Table of the notification includes taxes leviable under Customs Tariff Act, 1975. He further submits that, in view of the appeal filed against the order of the Tribunal relied upon by Learned Counsel, there is no binding precedent insofar as the present dispute is concerned. Furthermore, it was also contended that the decision of the Tribunal in *Interglobe Aviation Limited v. Commissioner of Customs [2020 (43) GSTL 410 (Tri-Del)]* has also been appealed against before the Hon'ble Supreme Court.

5. As the issue has, admittedly, been resolved by the Tribunal in their own case, in identical circumstances, with the finding that

> *'19. It is not possible to accept this contention of the learned Authorized Representatives of the Department. Section 2(15) of the Customs Act defines „duty" to mean duty of customs leviable under the Customs Act. Section 12(1) provides that the duties of customs shall be levied at such rates as may be specified in the Tariff Act or any other law for the time being*

in force. It only means that the rates for duties of customs can be specified either under the Tariff Act or any other law for the time being in force. It does not expand the meaning of 'duties of customs'. What is important to notice is that whereas section 2 of the Tariff Act refers to 'duties of customs', section 3 of the Tariff Act does not refer to 'duties of customs'. It only provides for levy of additional duty equal to the excise duty, sales tax, local taxes and other charges. Additional duty is levied under section 3(1) of the Tariff Act, whereas integrated tax and compensation cess are levied under sub-sections (7) and (9) of section 3 of the Tariff Act. Sub-section (11) of section 3 also refers to duty or tax or cess chargeable under section 3.

20. The Supreme Court in ***Prestige Engineering (India) Limited vs. Collector of C., Excise, Meerut*** *[1994 (73) E.L.T. 497 (S.C)] observed that once an expression is defined in the Act, that expression, wherever it occurs in the Act, Rules or Notifications issued thereunder, should be understood in the same sense. It is for this reason that it has been contended by learned Counsel for the Appellant that the expression "duty of customs" appearing at serial no. 2 of the Exemption Notification can have only that meaning which is assigned to it under section 2(15) of the Customs Act, which would be the "duty" leviable under the Customs Act and any other duty or tax which is not levied under the Customs Act, but levied under other enactments cannot be treated as a "duty of customs" for the purpose of customs notification.*

21. It is also relevant to refer to the judgment of the Supreme Court in ***Collector of Customs, Madras vs. Indian Organic Chemicals Limited*** *[2000 (118) ELT 3 (S.C)]**.** *Section 19 of the Customs Act relates to determination of duty where goods consist of articles liable to different rates of duty. Section 3 of* *the Tariff Act deals with levy of additional duty equal to excise duty. The Supreme Court held that since section 19 of the Customs Act applies to determination of "duty", it would only relate to "duty" under the Customs Act as is clear from section 2 (15) of the Customs Act and not the additional duty under section 3 of the Tariff Act. The relevant portion of the judgement is reproduced below:*

> ***"3.*** *In the first place, Section 19 of the Customs Act is inapplicable to the assessment of additional duty under the Customs Tariff Act**. Section 19 applies to "duty" that is, "duty under the Customs Act",*** *as is clear from Section 2(15) of the Customs Act.* ***The method of determination of Customs duty thereunder where goods consist of articles liable to different rates of Customs duty is not applicable for the purposes of assessment of additional duty under the Customs Tariff Act."*** ***(emphasis supplied)***

22. It is, therefore, clear that even the levy of additional duty under section 3 of the Tariff Act, which is in addition to the duty of customs under section 2 of the Tariff Act, would not be ***duty of customs*** *for the purpose of Notifications issued under the Customs Act.*

23. The Bombay High Court in ***Ceat Tyres of India Limited vs. Union of India [****1992 (57) ELT 221 (BOM.)] also held that the expression* ***duty of customs*** *covered only the basic customs duty and not the additional duty. The observations are as follows:*

> *"2. By a Notification issued under section 25 (1) of the Customs Act, 1962, the goods specified in the Table thereto were, when imported into India, exempted "from so much of that portion of the duty of Customs leviable thereon" as was in excess of the rates specified in the corresponding column of the Table.* ***The argument on behalf of the petitioners was that the expression "duty of customs" covered not only the basic customs duty but also additional and auxiliary duty. A Single Judge of this Court has taken the view that "duty of customs" covers only basic customs duty and not additional or auxiliary duty.*** *The Kerala High Court has*

> *taken the same view. A special Leave Petition was filed before the Supreme Court against this judgment of the Kerala High Court and it was dismissed by order dated 12th September, 1984 in SLP (C) 16629/44, M/s Kathayee Cotton Mills Ltd. vs. Union of India.* ***This point must, therefore, be decided against the petitioners." (emphasis supplied)***

24. In this connection, the judgment of the Supreme Court in M/s Unicorn Industries vs. Union of India & Others, 17 also needs to be referred to. The Supreme Court held that National Calamity Contingency Duty, Education Cess and Secondary and Higher Education Cess are in the nature of additional excise duty and when an exemption notification exempts duty of excise it would not automatically mean that these additional excise duties are also exempted. Thus, it was held that these additional duties do not come within the scope of the term "duty of excise".

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26. It is, therefore, clear that though integrated tax is levied under section 5 of the Integrated Tax Act, but it is collected in accordance with the provisions of section 3 of the Tariff Act on the value as determined under the Tariff Act and at the point when duties of customs are levied under section 12 of the Customs Act. Thus, integrated tax is levied under section 5(1) of the Integrated Tax Act and only the procedure for collection has been provided under section 3 of the Tariff Act.'

to distinguish the intent of the exemption in the said notification along with the finding that

'27. It also needs to be noted that the term "integrated tax" has not been defined either under the Customs Act or the Customs Tariff Act or under the Exemption Notification. As integrated tax is not levied under section 12 of the Customs

Act, it cannot be called "duty of customs". The charging section for integrated tax, in terms of which it is levied, is section 5 of the Integrated Tax Act and not section 3(7) of the Tariff Act. Section 3 (7) of the Tariff Act only provides for the manner of collection of the said integrated tax to be done by the Customs Authorities in case of import of goods. This is what was observed by the Madras High Court in ***Vedanta limited vs. Union of India*** *[**2018 (19) GSTL 637 (Mad.)**]*

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29. It is in the light of the aforesaid discussion that the meaning assigned to ***duty of customs*** *in the Exemption Notification has to be understood.*

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32. It is not possible to accept this reasoning advanced by the learned Authorised Representatives of the Department. In the first instance, the meaning assigned to ***duty of customs,*** *as discussed above, is the meaning assigned to "duty" under section 2(15) of the Customs Act, which would be the duty leviable under section 12 of the Customs Act. Mere omission to mention "specified in the First Schedule to the Tariff Act" after "Duty of customs" in the conditions set out in column (3) of the Table for Serial No. 2 cannot lead to an inference that* ***duty of customs*** *would include integrated tax and compensation cess. Column (3) of the Table refers to "Duty of customs" which would be leviable. Section 2(15) of the Customs Act defines "duty" to mean a duty of customs leviable under the Customs Act. It is section 12 of the Customs Act which provides that the duties of customs shall be levied at such rates as may be specified under the Tariff Act. Section 2 of the Tariff Act also provides that the rates at which duty of customs shall be levied under the Customs Act* *are specified in the First and Second Schedules to the Tariff Act. It, therefore, inevitably follows that the expression **duty of customs** occurring in the column (3) of the Table at serial no. (2) of the Exemption Notification would only mean the duty of customs leviable under the Customs Act as have been specified in the First and Second Schedules to the Tariff Act and not to integrated tax, which is levied under section 5 of the Integrated Tax Act.*

*33. This apart, it is also necessary to consider whether omission to add "specified in the First Schedule" after "Duty of Customs" in the conditions set out in column (3) of the Table at serial number 2 is deliberate or unintentional. To appreciate this, it would be necessary to examine whether it was at all necessary to add "leviable thereon which is specified in the said First Schedule" after "duty of customs" in the main body of the Exemption Notification. As noticed above, even if "leviable thereon which is specified in the said First Schedule" after "duty of customs" in the main body of the Exemption Notification, had not been added, it would have necessarily meant **duty of customs** that is defined under section 2(15) of the Customs Act read with section 12 of the Customs Act and section 2 of the Tariff Act. This in turn, would relate to the First Schedule of the Tariff Act. It, therefore, follows that it is only as a matter of abundant caution and only to make the intention clear beyond any doubt that the main body of the Exemption Notification includes duty of customs specified in the First Schedule. Thus, no significance can be attached to the fact that "specified in the First Schedule" has not been mentioned after "Duty of customs" in the conditions set out at column no. (3) in the Table for serial number 2 of the Exemption Notification.*

34. This precise issue was considered by the Supreme Court in ***Union of India and others vs. Modi Rubber Limited and Others*** *[1986 (25) ELT 849 (S.C)] though it is in the context of duty of excise levied under the Central Excises & Salt Act, 1944. The Supreme Court noticed that in some of the exemption notifications, the Central Government used specific language indicating that the exemption granted was in respect of the excise duty leviable under the Central Excises & Salt Act, 1944, but in some exemption notifications only "duty of excise" was mentioned without specifying "leviable under Central Excises & Salt Act, 1944". The Supreme Court observed that it is not uncommon that at times the Legislature, with a view to making its intention clear beyond doubt, uses words which may not be strictly necessary to be added since without them the same intention can be spelt out as a matter of judicial construction and this would be more so in the case of subordinate legislation by the executive. It often happens that the officer may employ words with a view to leaving no scope for possible doubts or even for greater completeness, though these words may not add anything to the word or scope to the subordinate legislation. Therefore, even if the words "duty of excise" leviable under the Central Excises and Salt Act, 1944 did not find place, as in the some exemption notifications, it would not necessarily lead to an inference that the expression "duty of excise" was intended to refer to all duties of excise, including the special auxiliary duties of excise. The Supreme Court emphasised that the expression "duty of excise" has to be interpreted bearing in mind the context in which it occurs. The Supreme Court, therefore, concluded that the expression "duty of excise" must bear the same meaning which it has in Rule 8(1), which is excise duty payable under Central Excises and Salt Act, 1944 and cannot bear an extended meaning so as to* *include special excise duty and auxiliary excise duty. The relevant paragraph of the judgment is reproduced below:*

> ***"9......................*** *Now, it is no doubt true that in these various notifications referred to above, the Central Government has, while granting exemption under Rule 8(1), used specific language indicating that the exemption, total or partial, granted under each such notification is in respect of excise duty leviable under the Central Excises and Salt Act, 1944.* ***But, merely because, as a matter of drafting, the Central Government has in some notifications specifically referred to the excise duty in respect of which exemption is granted as `duty of excise' leviable under the Central Excises and Salt Act, 1944, it does not follow that in the absence of such words of specificity, the expression `duty of excise' standing by itself must be read as referring to all duties of excise. It is not uncommon to find out that the legislature sometimes, with a view to making its intention clear beyond doubt, uses language ex abundanti cautela though it may not be strictly necessary and even without it the same intention can be spelt out as a matter of judicial construction and this would be more so in case of subordinate legislation by Executive. The officer drafting a particular piece of subordinate legislation in the Executive Department may employ words with a view to leaving no scope for possible doubt as to its intention or sometimes even for greater completeness, though these words may not add anything to the meaning and scope of the subordinate legislation****. Here, in the present notifications, the words `duty of excise leviable under the Central Excises and Salt Act, 1944" do not find a place as in the other notifications relied upon by the respondents. But, that does not necessarily lead to the inference that the expression `duty of excise" in these notifications was intended to refer to all duties of excise including special and auxiliary duties of excise.* ***The absence of these words does not absolve us from the obligation to interpret the expression `duty of excise****" in these Notifications. We have still to construe this expression what is its meaning and import and that has to be done bearing in mind the context in which it occurs. We have already pointed out that these notifications having been issued under Rule 8(1), the expression `duty of excise" in these notifications must bear the same meaning which it has in Rule 8(1) and that meaning clearly is excise duty payable under the Central Excises and Salt Act, 1944 as envisaged in Rule 2 clause (v). It cannot in the circumstances bear an extended meaning so as to include special excise duty and auxiliary excise duty."* ***(emphasis supplied)***

35. What also needs to be kept in mind is that mention of duty of customs, integrated tax and compensation cess in the main *body of the Exemption Notification implies that the Government was conscious of the distinction between the three. What is also important to notice is that after the phrase "duty of customs levied thereon which is specified in the said First Schedule", there is a comma before "and the integrated tax, compensation cess leviable thereon". This also clearly shows that duty of customs, integrated tax and compensation cess are three different entities. Above all, all the three, namely, duty of customs, integrated tax and compensation cess have been used in the main body of the same Exemption Notification.*

36. It would, therefore, be appropriate to refer to the judgment of Bombay High Court in ***Devidayal Electronics.*** *The Bombay High Court held that since the Notification used the word "factory" and also the word "industrial unit" in the same Notification, it has to be assumed that the said two words were intended to bear different meanings. The Court, therefore, held that the words "industrial unit" must mean something other than "factory".'*

to conclude that

'44. The inevitable conclusion that follows from the aforesaid discussion is that the absence of mention of ***integrated tax*** *and* ***compensation cess*** *in column (3) under serial no. 2 of the Exemption Notification would mean that only the basic customs duty on the fair cost of repair charges, freight and insurance charges are payable and* ***integrated tax*** *and* ***compensation cess*** *are wholly exempted.*

45. It would, therefore, not be necessary to examine the contention of learned Authorised Representatives of the Department that in case of any ambiguity in an Exemption Notification, the benefit should go to the Revenue. It would

> *also not be necessary to examine the remaining contentions advanced by the learned Counsel for the Appellant that the activity of repairs is "supply of service" or that the activity would not fall under the category of „import of service" under the Integrated Tax Act since the necessary ingredients mentioned therein have not been fulfilled.'*

in *Jet Airways (India) Ltd v. Commissioner of Customs, Air Cargo Commissionerate, New Delhi [final order no. 50004 – 50063/2021 dated 13th June 2021*], respectfully following the decision on the eligibility for exemption from levy of Integrated Goods & Service Tax (IGST) in accordance with the notifications, we set aside the impugned order and allow the appeals.

(Order pronounced in the open court on 21/12/2021)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*