

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH,
COURT NO. I

CUSTOMS APPEAL NO. 538 OF 2007

[Arising out of the Order-in-Original No. 07/2007 dated 27/04/2007 passed by
The Commissioner of Customs, Jodhpur Hqrs., Jaipur.]

Commissioner of Customs, Jodhpur Hqrs., **Appellant**
N.C.R. Building, Statue Circle, C-Scheme,
Jaipur.

VERSUS

M/s Indian Airlines Ltd., **Respondent**
Nehru Place, Tonk Road,
Jaipur.

WITH
CUSTOMS MISCELLANEOUS APPLICATION NO. 50205 OF
2021

(ON BEHALF OF THE DEPARTMENT)

APPEARANCE

Shri Girijesh Kumar, Authorized Representative (DR) – for the
Department
Shri Manoj Arora, Advocate – for the respondent.

CORAM : HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 54516/2024

DATE OF HEARING : 15.11.2023
DATE OF DECISION : 29.02.2024

P.V. SUBBA RAO

This appeal is filed by the Revenue to assail the order-in-
original dated 27.04.2007 passed by the Commissioner of
Customs, Jodhpur, whereby he held the Aviation Turbine Fuel

(ATF) worth Rs. 6,41,93,889/- was liable for confiscation under section 111 (f) (j) and (m) of the Customs Act, 1962 and confirmed the demand of customs duty amounting to Rs. 2,02,70,358/- and dropped the remaining part of the demand. He did not impose any redemption fine but imposed penalty of Rs. 2,02,70,358/- (equal to the amount of duty confirmed) under section 114A of the Act. The prayer in this appeal is for the CESTAT to decide :

- (a) Whether fine is required to be imposed on the non-prohibited goods once held confiscated and whether fine in lieu of confiscation of ATF is required to be imposed by the Commissioner in the facts of the case and ;
- (b) Whether freight @ 20% of FOB, insurance @ 1.125% of FOB and landing charges on 1% of CIF is required to be added to arrive at the assessable value of ATF in the case or not.

2. The appeal was initially dismissed by final order No. C/95 of 2011 dated 18.02.2011 on the ground that Revenue had not obtained clearance from the Committee of Disputes Resolution before filing the appeal. However, liberty was given to the Revenue to seek revival of appeal after getting such clearance. Thereafter, Revenue filed an application for restoration of appeal No. 41/2011 on the ground that the clearance from the Committee of Disputes Resolution was no longer necessary. This application was allowed by miscellaneous order dated 30.04.2012

and this appeal was restored to its original number. Assailing this miscellaneous order restoring this appeal, the respondent filed Writ-Petition No. 6841 of 2012 before the High Court of Delhi, which was dismissed by judgment and order dated 11.01.2013. Therefore, this appeal is before us to decide.

3. We have heard Shri Girijesh Kumar, learned authorized representative appearing for the department and Shri Manoj Arora, learned counsel for the respondent and perused the records.

4. Learned authorized representative explained the facts of the case as below.

5. The Directorate of Revenue Intelligence¹, Regional Unit at Jaipur received intelligence that the respondent was flying the same aircraft to various domestic destinations after completion of international run and that they were neither declaring the ATF in stock after completion of international run nor paying any customs duty leviable on the imported ATF i.e., the ATF lying in the tanks of the aircrafts at the time of completion of international flight and before the said aircrafts were reverted to run to domestic destinations. The respondents were procuring ATF overseas and also at domestic airports and the residual ATF available at the time of completion of international run was in excess of the quantities of ATF on board when the same aircraft commenced the next international run and that the aircraft

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retained substantial quantity of fuel on arrival, which was dutiable under Customs Act, as such fuel was imported into India. Therefore, the records and documents of the respondents were verified and the quantity of ATF that was imported and consumed was calculated and a show cause notice dated 29.11.2006 was issued demanding duty.

6. This show cause notice was adjudicated by the impugned order, the operative part of which is as follows :-

- (i) 4455142.6 liters of ATF (falling under CTH 2710) left over fuel in Aircraft Tank are imported goods and are chargeable to customs duties, as applicable ;
- (ii) Confiscated 4455142.6 liters of ATF valued at Rs. 6,41,93,889/- under section 111 (f), (j) & (m) of the Act. **However, the Commissioner did not impose any Redemption Fine under section 125 of the Customs Act, 1962 since the goods were not physically available for confiscation and no bond was executed by the importer at the time of clearance of the goods,** following ratio of order of the Tribunal's in the cases of **M/s Ram Khajana Electronics versus CC, Jaipur²** and **M/s Shivalaya Spinning & Weaving Mills (P) Ltd. versus CC, Amritsar³** ;
- (iii) Confirmed customs duty amounting to Rs. 2,02,70,358/- (Rs. Two Crore, two lacs, seventy thousand and three hundred and fifty eight only) including rebate amount which was suo-moto adjusted by M/s IAL, under section 28 (2) of the Act, customs duties of Rs. 1,97,16,192/- already deposited by M/s IAL to the Central Government accounts towards the above demand was appropriated ;
- (iv) Ordered to recover interest from M/s IAL on confirmed duty of Rs. 2,02,70,358/-, under section 28AB of the Act;
- (v) Imposed penalty of Rs. 2,02,70,358/- (Rs. Two Crore, two lacs, seventy thousand, three hundred and fifty-eight only) under section 114A on M/s IAL refraining from imposing penalty under section 112 of the Act;
- (vi) Personal penalty of Rs. 10,000/- (Rs. Ten thousand only) under section 112 (a) & (b) of the Act was also imposed on Shri Vijay Kumar, the then G.M. (Finance) of M/s IAL".

1. 2003 (156) E.L.T. 122 (Tri.)
2. 2002 (146) E.L.T. 610 (T)

7. The impugned order was reviewed by the Committee of Chief Commissioners and this appeal is filed on the following grounds.

(i) The imported ATF was not declared before the Customs authorities and hence it was liable for confiscation and the Adjudicating Authority has rightly confiscated it under section 111 (f), 111 (m) and 111 (j) of the Customs Act, but he did not impose any redemption fine, whereas the same was required to be imposed even if the goods were not physically available. The physical availability of the goods is of no consequence to imposition fine in lieu of confiscation. Reliance is placed on the following decisions :-

(a) **M/s Dadha Pharma Private Ltd.** versus **Secretary to Government of India**⁴

(b) **M/s Mohan Aluminium (P) Ltd.** versus **Commissioner of Customs, Mumbai**⁵

(c) **M/s Weston Components Ltd.** versus **Commissioner of Customs, New Delhi**⁶

(d) **M/s Big Byte Corporation** versus **Commissioner of Customs, Jaipur**⁷.

(ii) The Adjudicating authority confirmed the duty liability calculated on FOB value of the goods and did not include freight, insurance and landing charges in the

3. 2000 (126) E.L.T. 535 (Mad.)

4. 2007 (210) E.L.T. 513 (Tri. – Bang.)

5. 2000 (115) E.L.T. 278 (S.C.)

6. 2006 (201) E.L.T. 70 (Tri. – Del.)

value to determine the assessable value resulting in lower duty liability. Admittedly the value declared by the respondent was that of purchase of ATF overseas and so it was the FOB value only. To arrive at the assessable value freight @ 20% of FOB value, insurance @ 1.125% of the FOB value and landing charges @ 1% CIF value are required to be added in terms of section 14 of the Customs Act read with Rule 9 (2) of the Customs Valuation Rules, 1988. Therefore, the total duty confirmed should be enhanced Rs. 2,47,99,945/- and from Rs. 2,02,70,358/- confirmed by the Commissioner;

(iii) Consequently the penalty under section 114A also needs to be enhanced.

8. In view of the above, it is prayed that the appeal may be allowed and the duty may be enhanced as prayed for and redemption fine may be imposed in the matter.

9. Learned counsel appearing for the respondent submits that the two issues involved in this appeal are whether redemption fine should be imposed on the goods held liable for confiscation, but which were physically not available and whether the cost of freight, insurance and landing charges need to be included on notional basis to the FOB value for re-determine the duty. On the question of redemption fine, learned counsel supports the impugned order and asserts that where the goods are not

available for confiscation although they were held to be liable for confiscation, no redemption fine can be imposed.

10. On the question of inclusion of freight insurance and landing charges as to the FOB value to determine the duty on the ATF consumed during the domestic flights, he submits that this issue is no longer *res integra* and it has been decided in the respondent's own case by this Tribunal in the following two cases that freight and insurance and landing charges need not be included in the assessable value.

- (i) **M/s Air India Limited** versus **CC, New Delhi** in Customs Appeal No. 50002 of 2018 vide Final Order No. 51343 of 2018 dated 10.04.2018 ; and
- (ii) **M/s Air India Ltd.** versus **Commissioner of Customs (General), New Delhi** in Customs Appeal No. 53530, 53537-53538 of 2018 vide Final Order No. 51068 of 2019 dated 18.04.2019.

11. We have considered the submissions of both the sides.

12. When aircrafts land in India from abroad, they carry not only the passengers and goods, but also substantial quantity of fuel in their tanks. This is a necessary requirement for flying. Thereafter, if the aircraft goes on another international destination, the fuel so imported gets exported in its international leg. However, where, after coming from abroad, say, from Dubai to Delhi, the aircraft moves a domestic journey, say, from Delhi

to Mumbai and further, the fuel so imported in the fuel tank gets consumed on the domestic flights. The aircraft also buys fuel within India which is also filled in the same tank. At the end of its series domestic flights, if the aircraft flies out of India, on the next international run, some fuel may be there in the tank at that stage also. The net ATF, which has been imported into India and consumed in India is calculated by deducting the ATF available at the time of conversion to international run from the amount of ATF available in the aircraft when it is converted to domestic run. For instance, if the aircraft converts from international to domestic run and 30,000 liters of ATF is available in the Fuel Tank and finally when it again converts to international run, only 20,000 liters is in the aircraft, the 10,000 liters is treated as import and duty has to be paid on the quantity. On the other hand if 40,000 liters is available on conversion to international run, 10,000 liters of ATF is treated as exported. On the amount of ATF which is imported from abroad and consumed in India for domestic flights, the airline is required to pay customs duty and there is no dispute about this liability. It is also not in dispute that the respondent had maintained records as required, but had not paid customs duty on this amount of the ATF. After investigation, the respondents agreed to the duty liability and paid some amount of customs duty, which was also appropriated in the impugned order.

13. The fuel was imported into India and consumed without paying the customs duty. The Commissioner has, in the

impugned order held that ATF so imported and consumed was liable for confiscation and has actually confiscated the fuel. However, the fuel was already consumed and the Commissioner could not have confiscated it. If goods are confiscated under the Customs Act, the ownership and title of the goods moves to the fact that from the importer as per section 126 which reads as follows :-

“SECTION 126. On confiscation, property to vest in Central Government. —

- (1) When any goods are confiscated under this Act, such goods shall thereupon vest in the Central Government.
- (2) The officer adjudging confiscation shall take and hold possession of the confiscated goods”.

14. As per section 125 when goods are confiscated an option may be given in case of prohibited goods and shall be given in the case of other goods to the importer to pay a redemption fine in lieu of confiscation. If the importer opts to pay the redemption fine and pays it, the goods will be returned to the importer. If the importer does not opt to pay the redemption fine, the goods will stand confiscated. In this case, although the goods were confiscated it was only a notional confiscation because the goods were not available at all. The case of the Revenue is the redemption fine must have been imposed in lieu of confiscation. We do not find any force in this submission of the Revenue. If the redemption fine is imposed, it cannot be extracted from the respondents because redemption fine is only an option and the respondent may not opt for it. If the respondents opts for it and

pays the redemption fine then Revenue will have to return the confiscated goods which the Revenue cannot do in this case because the goods no longer exist.

15. The decisions relied upon by the Revenue do not carry its case any further. In the case of **Dadha Pharma Private Ltd.**, the decision of Madras High Court is that in order to attract penalty under section 112 the person should have done or omitted to do any Act which Act or omission would render such goods liable to confiscation under section 111. It is not necessary that the goods should have actually been confiscated and so long as the goods are liable for confiscation under section 111, the penalty under section 112 is attracted. The present dispute is not on this question. In the case of **M/s Mohan Aluminium (P) Ltd.**, the decision of the Tribunal was that the goods which were not available physically were liable for confiscation under section 111 (o) and accordingly the appellants were liable for penalty under section 114A and in the case of **M/s Weston Components Ltd.**, the goods were released on execution of a bond and bank guarantee and thereafter were confiscated. Under these circumstances, the Supreme Court held that if subsequently it is found that the import was not valid or there was any other irregularity which would entitle the customs authorities to confiscate the goods then the mere fact that the goods were released on the bond being executed would not take away the power of the customs authorities to levy redemption fine. It is to be noted that whenever seized goods are

provisionally released on execution of a bond pending adjudication the conditions of the bond are that if the goods ultimately confiscated the importer would pay a redemption fine in lieu of it. In the case of **M/s Big Byte Corporation** was also on the same question.

16. As far as the second question of the valuation is concerned, import duty has to be paid on the cost, insurance and freight value + the landing charges, i.e., the landed cost of the goods. If the cost of goods is available but the cost of the freight, insurance or cost of landing are not available then the cost of freight has to be taken as 20% of the FOB values, transit insurance is to be taken as 1.125% of the FOB value, and landing charges should be taken as 1% of the CIF value. This legal position is not in dispute. In this case, the actual freight incurred is ascertainable as NIL because the ATF was in the fuel tank of the aircraft and no freight was incurred. Similarly, the cost of transit insurance is ascertainable as NIL because there is no transit insurance on the fuel. The landing charges are also ascertainable as NIL because the fuel is not landed or taken out of the aircraft and it continues to be in the fuel tank. The cost of the freight, transit insurance and the landing charges being ascertainable as NIL, they cannot be included in the value of the ATF. In the appellant's own case in Customs Appeal No. 50002 of 2018, this Tribunal by its final order No. 51343 of 2018 dated 10.04.2018 held that the cost of freight, insurance and landing charges need not be included while arising the duty on the ATF

consumed in the fuel tank of the aircraft. This Tribunal has also held so in final order No. 51068 of 2019 dated 18.04.2019 in the appellant's own case.

17. In view of the above, we find no force in the appeal of the Revenue. Accordingly, the appeal is dismissed and the impugned order is upheld with consequential relief, if any, to the respondent.

18. The miscellaneous application also stands disposed of.

(Order pronounced in open court on 29/02/2024.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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