

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
{CUS.A.C. 1/2009}

% Judgment delivered on: July 29, 2010

COMMISSIONER OF CUTOMS (I&G)

..... Petitioner

Through Mr. Mukesh Anand, Advocate with
Mr. Mohit Kumar, Advocate.

Versus

SINGAPORE AIRLINES LTD.

..... Respondent

Through Mr. Kamal Nijhawan, Advocate with
Mr. Sumit Gaur, Advocate

CORAM:-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI,J (Oral)

1. Admit.
2. The following substantial question of law arises for consideration:-

“Whether the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) had jurisdiction to hear the appeal filed by the respondent against the order passed by the Commissioner (Appeals) under Rule 11 of the Inland Air Travel Tax Rules, 1989.”

3. Since it's a pure question of law, with the consent of the learned counsel for the parties, we have heard the matter at this stage itself.
4. Vide Finance Act, 1979; Foreign Travel Tax (FTT) was

introduced by insertion of Chapter-V therein. Section 35 of the said Act is the charging Section and stipulates the amount of Travel Tax which the passengers as well as carriers are supposed to pay. Section 38 of the said Act provides for the penalties and reads as under:-

“38. (1) Every passenger who embarks or attempts to embark on an international journey without paying the tax payable by him under this chapter shall, in addition to his liability to pay the tax, be liable to a penalty not exceeding two hundred rupees.

(2) Every carrier or other person in charge of a ship or an aircraft, who, in contravention of the provisions of Section 37, allows any passenger or passengers to board the ship or aircraft, shall be liable to a penalty not exceeding three times the amount or the aggregate amount of the tax payable by the passenger or passengers so allowed to board the ship or aircraft.

(3) Every carrier or other person who fails to pay the foreign travel tax to the credit of the Central Government under sub-section (2) of section 35 shall, in addition to the payment of such tax and the interest leviable thereon, be liable to pay penalty which shall not be less than one-fifth but which may extend to three times of the amount of the tax not so paid to the credit of the Central Government.

(4) Any rule made under this Chapter may provide that in case of breach thereof by the carrier or other person, he shall be liable to a penalty which shall not be less than five hundred rupees but which may extend to fifty thousand rupees, and where the breach is a continuing one, with further penalty which may extend to five hundred rupees for every day after the first during which such breach continues.

(5) Any penalty under this section may be adjudged, collected and paid to the credit of the Central Government by such authority and in such manner as may be specified in the rules made under this Chapter:

Provided that no order for imposing a penalty shall be passed by such authority unless the carrier or other person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter by such authority.”

5. Section 40 gives power to the Central Government to make Rules for carrying out the purpose of the said Chapter namely Chapter-5. In exercise of these powers, the Central

Government has framed Inland Travel Tax Rules, 1989. Rule 9 thereof provides for adjudication of penalties in case there is a violation of the provisions of Chapter-5 of the Finance Act and the said Rules *inter alia* for non-payment or short payment of tax. The adjudication power is given to Assistant Collector of Customs. Rule 10 provides for procedure before such a penalty can be levied and stipulates that no order imposing any penalty shall be made unless such person is given a notice in writing informing him of the grounds on which it is proposed to impose a penalty and given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice as well as reasonable opportunity of being heard in the matter. If penalty order is passed by the Assistant Collector of Customs, after adjudication, these Rules also provide for appeal. As per Rule 11, appeal lies to the Collector of Customs (Appeals), Delhi. In addition, Central Government is given revisionary powers. It can act on its own motion on an application of any person aggrieved by any order passed under Rule 11 or Rule 12, annul or modify such orders passed by the Assistant Commissioner of Customs or the Commissioner of Customs, as the case may be. This power is conferred upon by the Central Government by Rule 13 of the aforesaid Rules.

6. In the present case, the respondent was served with show cause notice dated 27th April, 2004 alleging therein that it had failed to deposit an amount of Rs. 45,07,500/- towards FTT for the month of March, 2003 within the period stipulated in Rule 9 of the FTT Rules. After hearing the respondent, adjudication

order dated 12th August, 2004 was passed by the Additional Commissioner, Customs. The petitioner preferred appeal there against before the Commissioner of Customs (Appeals) which was, however, dismissed on 29th April, 2008. Against this order, the respondent did not file any revision as provided in Rule 13 (ibid) . Instead, the respondent preferred further appeal before the CESTAT. This appeal has been allowed by the CESTAT vide orders dated 6th November, 2008. It is in this backdrop, in the present appeal preferred by the appellant, it is contended that CESTAT had no jurisdiction to entertain the appeal as no such appeal is provided under the Rules. It is further contended that CESTAT was under the wrong motion that appeal is under the Customs Act, whereas, the action taken was not under the provision of Customs Act but Inland Air Travel Tax Rules read with Finance Act, 1979. This position in law could not be disputed by the learned counsel for the respondent. His submission was, however, that order of the Commissioner (Appeals), the respondent received covering letter wherein it was specifically stated that if the respondent was aggrieved of the orders of the Commissioner (Appeals), it was open to it to file appeal against that order which was under Section 129 (A) of the customs Act. It is, therefore, stated that the respondent went by the said statement contained in the covering letter of the Commissioner (Appeals) and preferred the appeal under Customs Act. It is further stated that when the appeal was heard by the Tribunal, no such plea of want of jurisdiction was taken by the appellant.

7. Learned Counsel for the respondent may be right in his submission that the respondent took the step of filing of appeal influenced by the statement contained in covering letter which he received alongwith the order passed by the Commissioner (Appeals), Customs. However, the fact remains that the CESTAT had no jurisdiction to hear the said appeal as no such appeal is provided under the Rules. In **Hiralal Patni v. Kalinath (1962) 2 SCR 747** the Hon'ble Supreme Court observed that:

“Competence of a Court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction”

8. Further, in **Subhash Mahadevasa Habib v. Neemasa Ambasa Dharmadas (2007) 13 SCC 650** the Hon'ble Supreme Court observed that:

“...an inherent lack of jurisdiction may make a decree passed by that Court one without jurisdiction or void in law...”

There is no natural or inherent right to file appeal and such a right is granted to the aggrieved parties by the statute. If there is no statutory appeal provided, the Tribunal which is the creation of the statute does not get jurisdiction to hear such an appeal.”

9. In **Kondiba Dagadu Kadam v. Savitri Bai Sopan Gujar (1999) 3 SCC 722**, the Court held:

“It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right it has to be regulated in accordance with law in force at the relevant time.”

10. Similarly, as pointed out above, against the order of the Commissioner (Appeals), Customs, only revision is provided and that too, this revision lies to the Central Government. CESTAT does not come into the picture at all in these Rules. Therefore,

it is a case of inherent lack of jurisdiction on the part of CESTAT to entertain such an appeal and such an order would clearly be null and void in the eyes of law as also has been seen in the aforementioned cases. In **Kiran Singh v. Chaman Paswan AIR 1954 SC 340**, it was observed by the Court that, “a defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of the parties.” Therefore, even the consent of the parties cannot cure the inherent lack of jurisdiction. For this reason, even if there was a misstatement in the covering letter of the Commissioner (Appeals), since there is no estoppel in law, the respondent may not be allowed to take the plea of estoppel against the statute. It is a well settled principle of law which has been followed in a catena of judgments, that the principle of estoppel has no application against a statute. This principle was reiterated recently, in **Vijay Narayan Thatte and Others v. State of Maharashtra and Others** [(2009) 9 SCC 92]. Similarly, the Bombay High Court, in **St. Francis Industrial Training Institute and Ors. v. P.J. Jose and Ors.** [(2007)(1) Bom CR 675] observed that:

“....there can neither be an estoppel against a statute nor can jurisdiction upon the Tribunal be confirmed by consent.”

11. Therefore, such misstatement in the said letter would not come to the rescue of the respondent.
12. We are, therefore, of the opinion that the appeal preferred by the respondent before the CESTAT was not maintainable for

want of any provision in the Rules and the order is unsustainable in law. It is accordingly set aside. At the same time, we find that the respondent was misled by none else but by the office of the Commissioner (Appeals) who misguided the respondent by stating that appeal under Section 129 (A) of the Customs Act could be preferred against his order before the CESTAT. Therefore, while granting opportunity to the respondent to prefer revision against the order of the Commissioner (Appeals), we direct if such a revision is preferred within two months, the revision shall not be dismissed on the ground of limitation and shall be entertained on merits by the Central Government.

13. Further, since the respondent was made to file the said appeal which was not competent at the instance of the appellants, we also impose cost of Rs. 25,000/- on the petitioner.

(A.K.SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

JULY 29, 2010/skb