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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P. (C) 2340/2007**

JET AIRWAYS INDIA LTD. ..... Petitioner

Through: Mr. S. Ganesh, Sr. Adv. with Mr. U. A. Rana, Mr. Himanshu Mehta, Mr. Avirat Kumar and Mr. Satendra Kumar Rai, Advs.

versus

ASSISTANT COMMISSIONER OF CUST ..... Respondent

Through: Mr. Sanjeev Narula, Sr. Standing Counsel and Mr. Abhishek Ghai, Adv.

CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

<u>O R D E R</u>

% **18.07.2017**

<u>Prathiba M. Singh, J.</u>

1. A short question that has arisen in the present petition is whether the Petitioner is entitled to refund of Inland Air Travel Tax ('IATT') deposited by it for the period, 1st October, 2001 to 8th October, 2003. The refund is sought on the basis that Sky Marshals who were deployed on its aircrafts are not `passengers' within the meaning of Section 41(f)(ii) of the Finance Act, 1989 ('FA') and hence no IATT is payable qua the sky marshals.

2. In view of the increasing threat perception to air passengers, crew and aircrafts, the Government of India issued Notification dated 20th September,

2001, making it mandatory for air carriers to carry Sky Marshals free of charge. The deployment of Sky Marshals was to be done by the Bureau of Civil Aviation Security ('BCAS') from time to time. Initially, this obligation was imposed only on Indian Airlines. A corresponding Notification dated 19th April, 2001 was issued under Section 42 (1) of the Finance Act, 1989 exempting Indian Airlines from payment of IATT. Thereafter, the obligation to deploy Sky Marshals, was extended to private airlines as well by AVSEC order 7/2001 dated 20th September, 2001. In view of this notification, the Petitioner had to necessarily carry Sky Marshals on board its aircrafts. Thereafter, by Notification No.1 of 2003 dated 8th October, 2003 issued by the Ministry of Finance, the exemption granted to Indian Airlines from payment of IATT was extended to all domestic private airlines.

3. The Petitioner, who had deposited Rs.2,36,06,775/- between October, 2001 to October, 2003, towards IATT qua Sky Marshals, sought refund of on the ground that the exemption ought to be extended to it. This refund claim was processed and Assistant Commissioner of Customs (IATT) by order dated 5th November, 2004 sanctioned refund of Rs.6,48,954/- for the period subsequent to 8th October, 2003 but the remaining refund claim amount of Rs.2,29,23,656/- pertaining to the period 1st October, 2001 to 7th October, 2003 was rejected. In the meantime, the Petitioner had made a representation to the Joint Secretary (Finance) on 7th October, 2005 which was also rejected vide order dated 16th November, 2005 by the Director (Customs).

4. The Petitioner thereafter filed an appeal challenging the order dated 5th November, 2004 before the Commissioner of Customs (Appeals) (IATT). The said appeal was rejected by order dated 11th December, 2006 on the ground of being barred by limitation.

5. The present writ petition has been filed challenging the said order dated 11th December, 2006 passed by the Commissioner of Customs (Appeals) (IATT).

Petitioner's Submissions

6. Mr. S. Ganesh, learned Senior Counsel for the petitioner submits that the understanding of all airlines was that IATT was not payable qua Sky Marshal deployed on their flights and this position of the Petitioner is also reiterated by the BCAS vide letter dated 24th July, 2002. Mr. Ganesh further submits that the non-extension of the exemption, applicable to Indian Airlines, to other airlines while making it compulsory to deploy Sky Marshals, is illegal and arbitrary and that the fact that IATT was not payable is fortified by the subsequent clarification issued on 8th October, 2003. The Petitioner having provided Sky Marshals deployed by the BCAS on all its flights ought not to be saddled with the IATT burden and is hence entitled to refund.

Respondent's Submission

7. Mr. Sanjeev Narula, learned Sr. Standing Counsel appearing for the respondent submits that the orders passed by the Original and the Appellate Authority cannot be faulted, inasmuch as, the benefit which could have been

extended to the petitioner has already been given to it. Mr. Narula further submits that the Petitioner has not challenged the validity of either the provisions of law viz., Sections 41(f) and 42 of the FA or any of the notifications/circulars issued.

Analysis

8. Sections 41(f), 42 and 45 of the FA read as under:-

> "*41. Definitions.—In this Chapter, unless the context otherwise requires,—*
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> *(f) "passenger" means any person boarding, at any aerodrome, an aircraft for performing an inland journey, but does not include,—*
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> *(i) a person who performs an inland journey on a through international ticket and which precedes, or forms part of a series of journeys preceding, or follows, or forms part of a series of journeys following, a journey to or from a place outside India on the same ticket; or*
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> *(ii) a person employed or engaged in any capacity on board the aircraft on the business thereof.*
>
> *42. Inland air travel tax.—(1) With effect from the date of commencement of this Chapter, there shall be levied on all passengers embarking on every inland journey,[***] a tax (hereafter in this Chapter referred to as the inland air travel tax) at the rate of [fifteen percent], of the fare paid by such passengers for every such journey.*
>
> *Explanation.—When a passenger performs an inland journey at a concessional rate or without being charged any fare, the fare ordinarily payable for the journey shall, for the purposes of this section, be deemed to have been paid by such passenger.*

(2) In accordance with the rules made under this Chapter, the inland air travel tax shall be collected by the officers of customs appointed under the Customs Act, 1962, or the Central Excise Officers appointed under the Central Excises and Salt Act, 1944, or such officers of the Central Government or the State Government or the International Airports Authority of India constituted under the International Airports Authority Act, 1971, or the National Airports Authority constituted under the National Airports Authority Act, 1985, or such carriers, as may be authorised in this behalf by the Central Government by notification in the Official Gazette and paid to the credit of the Central Government.

45. Passengers not to be permitted to board aircraft without payment of inland air travel tax.—No carrier or other person in charge of an aircraft shall allow any passenger to board the aircraft unless such passenger has paid the inland air travel tax."

9. A perusal of the above three provisions shows that it was compulsory for all airlines to collect IATT from all passengers.

10. The petitioner has prayed for the following reliefs in the writ petition.

"*(a) Issue a Writ of certiorari or writ in the nature of certiorari, calling for the records of the present case and after scrutinising the same, set aside and quash the impugned Order in original of the Assistant Commissioner of Customs dated 05.11.2004;*
(b) In the alternative, issue a Writ of certiorari or writ in the nature of Certiorari, calling for the records of the present case and after scrutinising the same, set aside and quash the impugned Order in Appeal dated 11.12.2006; passed by the Commissioner of Customs (Appeals);
(c) Issue a Writ of mandamus or a Writ in the nature of mandamus, ordering/directing the Commissioner of Customs (Appeals) to hear and dispose of the Petitioner's Appeal

against the Order in Original of the Assistant Commissioner dated 05.11.2004 on merits without considering the same to be barred by limitation and to grant consequential refund, as may be found due"

11. The petitioner has not challenged or sought any declaration that sky marshals do not constitute passengers under Section 41(f) of the FA. The petitioner has merely prayed for setting aside/quashing the original order of the Assistant Commissioner of Customs dated 5th November, 2004 and the order of the Commissioner of Customs (Appeals) dated 11th December, 2006.

12. In the order dated 5th November, 2004, the Assistant Commissioner of Customs has categorically held that Notification No.2 of 2001 dated 19th April, 2001 is applicable only qua Indian Airlines. The relevant paragraphs of the said order read as under:-

"*I have carefully gone through the facts and the notifications mentioned as above and found that M/s. Jet Airways is only entitled for refund of IATT amount on Sky Marshal tickets that has been deposited with government treasury on & after 08.10.2003 to 30.11.2003 in conformity with notification no.1/2003 dated 08.10.2003 as notification no.2/2001 dated 09.04.2001 is only applicable purely in relation to India airlines and the carrier is not entitled for availment of the benefits of said notification.*"

13. This cannot be faulted with inasmuch as it is a matter of fact that Notification No.2 of 2001 dated 19th April, 2001 granted the exemption from IATT to only sky marshals performing inland journey by air on free tickets issued by the Indian Airlines. The exemption was only subsequently

extended to other domestic private airlines. Thus, there is no error in the order dated 5th November, 2004.

14. Insofar as the Appellate order passed by the Commissioner of Customs (Appeals) is concerned, the limitation for filing the same was three months under Section 128 of the Customs Act, 1962 ('CA'). The appeal admittedly was filed belatedly on 28th December, 2005 and was rightly dismissed by the Commissioner of Customs (Appeals). The relevant portion of the order reads as under:

> "*The Appellant was free to file the appeal against the impugned order and approach the various authorities for getting the benefit of the said notification retrospectively simultaneously. The Appellant has not applied even for condonation of delay in the appeal. The appeal was filed after 418 days. Therefore I find that the appeal is hit by the limitation clause and is time barred.* "

15. The factual position being that the appeal was delayed by more than 400 days and not even an application for condonation of delay was filed by the Petitioner, the appellate order of the Commissioner of Customs (Appeals) also cannot be faulted.

16. The writ petition before this court was filed in 2007. The Petitioner has not sought to either amend its petition or seek a declaration challenging any of the provisions or the notifications/circulars. The Petitioner having not sought for the said relief, this court does not find any reason to interfere with the impugned orders dated 5th November, 2004 and 11th December, 2006. Prayers in the writ petition being restricted to the correctness of these two

orders only, no case is made out.

17. In facts and circumstances of the present case, the writ petition is dismissed, with no order as to costs.

PRATHIBA M. SINGH, J

S.MURALIDHAR, J

JULY 18, 2017
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