

Sl. No. 158

BEFORE DELHI VALUE ADDED TAX, APPELLATE TRIBUNAL DELHI
Sh. Narinder Kumar, Member (Judicial) & Sh. Rakesh Bali, Member (Administrative)

Ref. No. 34-42/ATVAT/2014-15

Date of Order: January 5, 2022

M/s. Air India,
(Formerly known as Indian Airlines),
Northern Region,
Old Engineering Building,
IGIA, Palam,
New Delhi.

.... Appellant –Applicant

V

Commissioner of Trade & Taxes, Delhi

..... Respondent

Counsel representing the Appellant

: Sh. Ashok Godiya &
Shri Vijay Singhal.

Counsel representing the Revenue

: Sh. M.L. Garg.

ORDER

1. On 28/8/2014, Dealer – Applicant filed the above captioned nine applications with prayer for making of reference of certain questions of law, mentioned therein, to the Hon'ble High Court.
2. The applications came to be filed after disposal of appeals Nos.1025-1033/ATVAT/10, which pertained to tax period 1991-

Narinder Kumar
5/1/22

Rakesh Bali

92, 1992-93, 1993-94, 1998-99, 1999-2000, 2000-01, 2001-02, 2002-03 & 2003-04. The appeals were filed by the dealer – appellant-applicant challenging common order dated 9/12/2010 passed by First Appellate Authority (here-in-after referred to as FAA), whereby the appeals filed by the assessee against orders of reassessment of tax, interest and penalty framed by the Assessing Authority (Ward-99), were disposed of thereby deleting assessment as regards interest and penalty, but upholding assessment on the point of tax.

3. It may be mentioned here that reassessment of the assessee – appellant was carried out by the Assessing Authority for the year 1991-92, 1992-93, 1993-94, 1998-99, 1999-2000, 2000-01, 2001-02, 2002-03 & 2003-04, after it came to notice of the department during visits of Inspectors that the assessee – appellant was selling used aircrafts and other scraps every year. So, the Assessing Authority raised following additional demands:

TAX PERIOD	TAX(RS.)	INTEREST	PENALTY(RS.)
1991-92	3,05,871/-	3,94,320/-	35,000/-
1992-93	2,13,070/-	2,28,541/-	35,000/-
1993-94	4,01,689/-	---	30,000/-
1998-99	3,23,655/-	1,16,516/-	3,23,655/-
1999-2000	3,42,882/-	1,12,115/-	3,11,431/-

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2000-01	4,65,930/-	1,42,778/-	4,53,264/-
2001-02	4,84,548/-	84,626/-	4,70,144/-
2002-03	3,46,241/-	59,783/-	3,32,126/-
2003-04	1,93,410/-	18,868/-	1,57,265/-

4. Feeling dissatisfied with the orders dated 9/12/2010 passed by FAA, the assessee – appellant filed appeals No 1025-1033/ATVAT /10, before this Appellate Tribunal.
5. Vide common judgment dated 5/6/2014, the Appellate Tribunal dismissed all the nine appeals while observing that the same were devoid of any merit and substance.
6. It may be mentioned here that while disposing of the nine appeals, the Appellate Tribunal took into consideration that the issues involved in the said nine appeals were identical to the appeals earlier disposed of by the Tribunal vide judgment dated 13/1/2003, in respect of assessment order 1994-95. The Appellant Tribunal observed that there was no reason to deviate from the findings recorded in previous judgment dated 13/1/2003.
7. Following were the observations, on the question of reassessment, made by the Appellate Tribunal in the previous

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judgment dated 13/1/2003:

"We find some merit in Sh. Mittal's submissions. The Assessing Authority performed a statutory function and is neither principal or agent for other assessing authorities, the Enforcement Wing or the Commissioner.

Evidently, the STO, Ward-99 who framed the original assessment and who, according to the appellant also, is the proper Assessing Authority of the appellant, neither had any information of sale of aircrafts and scraps nor the appellant brought this primary information on record.

According to the Hon'ble Supreme Court in Calcutta Discount Co. Ltd. vs. I.T.O. (1961) 41 ITR 191 and uninterrupted series of judgments, thereafter, the primary facts, though not the possible inferences that might be derived there from, were to disclosed by the assessee only. The question is covered by our orders in Media Video Ltd. (2001) 10 STT 173 and Sharad & Co. Appeal No. 704/STT/93-94 order dated 23.10.2002.

Having not done so, there is no case for mere change of opinion and this limb of argument fails.

On the issue of taxability of sale of old aircraft/scrap, earlier the Appellate Tribunal opined as under: -

"13. Sh. Gadia has relied upon the Hon'ble Supreme Court in State of Tamil Nadu vs. Board of Trustees of the Port of Madras, JT 1999(2)

SC 410 to submit that if the main activity is not business and the amount of such business activity is infinitesimal, an independent intention to carry on business in that ancillary activity should be proved by the revenue. The figures of all India collection and the impugned turnover have been placed on record. For the year 1994-95, total receipts of the appellant company are Rs.2,070/- crores whereas the impugned turnover is Rs.3.92 crores. The maximum turnover during any year of the last decade of the millennium has been Rs.33.48 crores as against annual collections of about Rs. 3,000 crores.

In the first glance, the argument appears to be attractive but does not hold water. In the Port of Madras (supra), and in other cases like CST vs. Sai publication Fund JT 2002 (3) SC 295 and State of Haryana vs. Photolitho Press (2002), 126 STC 253 the Courts found that in view of the objects of the appellants, the main activities were not business, i.e. manufacture, trade or commerce but statutory functions, charity or administrative functions of the State. Hence, the ancillary activity could also not be business. While concluding that the main activities did not amount to business the meaning of business was that "business" includes manufacture, trade and commerce, not that "business" means buying and selling of goods. With this definition Port Trust, a religious Institution to spread message of a saint, an educational Society running schools, colleges and temples were held not to carry on business. The same cannot stand true with the appellant company.

No doubt, the profit motive is immaterial but it simply means that there

can be a business without a motive of or resulting into profit. However, the converse is not true. The main objects of the appellant company leave no doubt as to the appellant's business as airline as well as to buy, sell and deal in aircrafts etc. The appellant's case, to our mind, is quite different from DTC and AP Road Transport Corporation relied upon by the appellant.

Even, if the appellant's argument that the aircrafts and the other goods which became other scrap were not purchased to be sold as such but to be used in the business, transactions of sale are incidental or ancillary to or in connection with the appellants 'business' as an airline as established in DTC's case and Andhra Pradesh Road Transport Corporation's case.

In this view, the argument of the appellant company that it is not a dealer qua the sale of old air craft/scrap is not sustainable and is rejected."

8. It may be mentioned here that earlier, as regards the assessment year 1994-95, vide order dated 21/5/2003 on similar application filed by the assessee – appellant, this Appellate Tribunal has already referred following questions of law to the Hon'ble High Court :

"(1) Whether in the facts and under the circumstances of the case, the Tribunal was right in holding that the activity of the

Indian Airlines Limited is 'commerce' covered under the definition of 'business' in clause (i) of Section 2(c) of the Delhi Sales Tax Act, 1975?

(2) If the answer to question No.1 is in the affirmative, whether in the facts and under the circumstances of the case, the Tribunal was right in holding that the transactions of sale of scrap, spare parts, other material and old aircrafts are "business" falling under clause (ii) of Section 2(c) of the Act being incidental or ancillary to or in connection with the business?

(3) Whether in the facts and under the circumstances of the case, the Tribunal was correct in holding that the Indian Airlines, being a company, was not entitled to be declared 'non-business' as distinguished from the Delhi Transport Corporation and the Andhra Pradesh Road Transport Corporation?

(4) Whether in the facts and under the circumstances of the case when the dealer did not impart the information to his assessing Authority, the Tribunal was right in law in holding that the knowledge and information with the other assessing authorities or the Enforcement Wing could not be imputed to the Assessing Authority of the dealer for the purpose of re-assessment?"

9. Thereafter, as regards the assessment for the year 1995-96, 1996-97 and 1997-98, vide order dated 7/5/2015, on another similar

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application, filed by the dealer-applicant, Appellate Tribunal, also referred following questions of law to the Hon'ble High Court:

"1. Whether in the facts and under the circumstances of the case, the Tribunal was right in law in holding that the interest was chargeable under section 27(1) of the Act from the date of Re-assessment?

2. Whether in the facts and under the circumstances of the case, the Tribunal was right in law in holding that the dealer was liable for penalty?"

10. In the present nine applications with prayer for reference, the applicant has alleged that the applicant is engaged in the services of Civil Aviation, and as such the applicant is not liable to be registered under the provisions of Delhi Sales-Tax Act, 1975 and, therefore, no tax liability should be determined on its incidental activities; that the appellant is not dealing in any business as provided in Section 2 (c) of Delhi Sales-tax Act, 1975; that in the case of applicant, the main activity is not business as defined in Clause-C of Section 2, and therefore, its incidental activities like sale of unserviceable (rejected) aircrafts and unserviceable stores and spare parts arisen in the course of its main activity of Civil Aviation are also not subject matter of Delhi Sales-tax Act, 1975.

11. In support of the above averments, applicant has referred to the following decisions :

- i) Commissioner of Sales Tax vs. Delhi Transport Corporation reported in 35 DSTC, 1995-96 Page J-301.
- ii) State of Tamil Nadu and Another vs. Board of Trustees of the Port of Madras reported in 114 STC Page 520.

12. The applicant has further alleged in the application as under –

“The basic activity of the appellant company is in the nature of service industry and which is not the subject matter of Delhi Sales-tax Act, 1975; (that) it is registered with the Delhi Sales-tax Department, New Delhi just for running of its staff canteen and supply made to VVIP Flights and, if any scrap arises in the canteen and it is sold then it comes under the clutches of Delhi Sales-tax but not the sale of unserviceable aircraft, stores and spare parts arisen in the course of providing Civil Aviation Services.

In addition to above, it is further stated that Section 3 is a charging section which says that tax is to be paid on turnover of a dealer and dealer has been defined in sub-section (e) of Section 2 of Delhi Sales-tax Act, 1975.

As already pointed out that the activity of the appellant in question are not covered in the definition of business as defined in Section 2(c) of Delhi Sales-tax Act, 1975.”

13. The applicant has also stated in the application as under -

“Without prejudice to above, it is also stated that the re-assessment proceedings initiated u/s 24 and completion of assessment is bad in law because at the time of original assessment, the Assessing Officer was in possession of the material, there was sufficient application of mind on these materials which were in respect to selling of unserviceable (rejected) aircrafts and unserviceable stores & spares. Therefore, re-assessment on the same material amounts to change of opinion on the same set of facts, which is not allowed under the provisions of law as decided in the case of:

- a. CIT vs. Adarsh Paper Board Mfg. Co. reported in 65 STC Page 243 (All.)
- b. Anoop Lal Sohan Lal vs. CST reported in 69 STC Page 254 (All.)
- c. Bhim Raj Madan lal vs. State of Bihar reported in 56 STC Page 273 (Patna).
- d. Anandji Hari Dass & Co. Pvt. Ltd. Vs. S.P. Kushare reported in 21 STC Page 326 (SC.)”

14. Accordingly, the applicant has prayed for reference of the following questions of law to the Hon'ble High Court :-

- i). Whether in the facts and circumstances of the case for the purpose of charging Sales-tax, a person should be engaged in the business of selling goods, than only he can become dealer and incidental activity of such business should be taxable or otherwise?
- ii) Whether in the facts and circumstances of the case, the Tribunal is right in holding that in providing Air Transport Services to people of Country by Air India Limited (formerly known as Indian

Airlines Limited) is carrying on the Commercial activity and such activities are covered in business as specified in Section 2(c) of the Delhi Sales-tax Act, 1975.

- iii) Whether in the facts and circumstances of the case, the Tribunal is right in holding that since, the services of Air India Limited (Formerly Known as Indian Airlines Limited) are commercial activity, therefore, sale of scrap including old and unserviceable aircrafts, spare parts and other material are taxable being incidental activities, although its main activity is not taxable?
- iv) Whether in the facts and circumstances of the case, that the profit motives is the only criteria on the basis of which the case of appellant company i.e. Air India Limited (Formerly known as Indian Airlines Limited) can be distinguished from the judgment of Delhi Transport Corporation reported in 35 DSTC, 1995-96 Page J-301 Andhra Pradesh State Road Transport Corporation reported in 27 STC Page 42 and Board of Trustees of the Port of Madras reported in 114 STC page 520?
- v) Whether in the facts and circumstances of the case, a person can be deemed to be engaged in the business only because some business activities are mentioned in its object clause of Memorandum of Association or a business as defined in the Delhi Sales-tax Act, 1975 is to be determined on the basis of its actual activities?
- vi) Whether in the facts and circumstances of the case, the initiation of re-assessment proceedings u/s 24 and completion thereof is bad in

law, when at the time of original assessment, the assessing authority was in possession of material on the basis of which re-assessment was made?

vii) Any other question which arises from the facts and circumstances of the case, which the Hon'ble Tribunal may deem just and proper."

15. It has been pointed out by learned counsel for the Revenue that on earlier ST reference No. 1/2011, 2/2015, 3/2015 and 4/2004, on similar applications of the present assessee – applicant, our own Hon'ble High Court has already passed order dated 12/9/2017 and, referred the matter to Hon'ble Acting Chief Justice for ⁱⁿ Constitution of a larger bench, while observing that the following question of law involves a reconsideration of the judgment of the Division Bench of the Hon'ble High Court, in Commissioner of Sales Tax vs. DTC, 1996 III AD (Delhi) 462, are :-

"Whether the sale of unserviceable (rejected) aircraft and unserviceable stores, scrap and spare parts by the Petitioner are amenable to Sales Tax under the provisions of the Delhi Sales Tax Act, 1975?"

16. When attention of learned counsel for the applicant has been drawn to the above question of law, he submits that he presses these applications for making of reference only the said question of law already sub-judice before Hon'ble High Court.

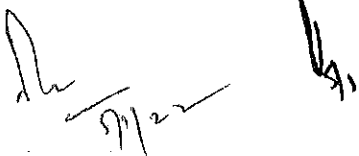
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Having regard to all the facts and circumstances of the case, the findings recorded by the Appellate Tribunal that the main objects of the appellant company left no doubt as to the appellant's business as airline as well as to buy, sell and deal in aircrafts etc and that appellant's case was held to be quite different from DTC and AP Road Transport Corporation relied upon by the appellant, and on the other hand in view of the case of the appellant-applicant that sale of unserviceable aircraft and unserviceable stores, scrap and spare parts is not amenable to Sales Tax under the provisions of Delhi Sales Tax Act, 1975, the following question of law involves a reconsideration of the judgment of the Division Bench of the Hon'ble High Court, in Commissioner of Sales Tax vs. DTC, 1996 III AD (Delhi) 462,

are :-

"Whether the sale of unserviceable (rejected) aircraft and unserviceable stores, scrap and spare parts by the petitioner are amenable to Sales Tax under the provisions of the Delhi Sales Tax Act, 1975?"

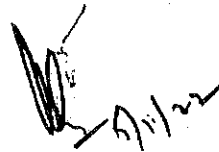
Accordingly, these applications are disposed with making of reference to the Hon'ble High Court of Delhi, for decision on the above said question of law.

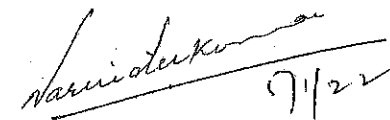


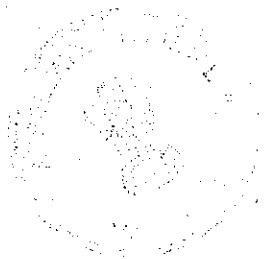
17. Copy of the order be supplied to both the parties as per rules.
One copy be sent to the concerned authority. Another copy be displayed on the concerned website.

Announced in open Court.

Date : January 5th, 2022


(Rakesh Bali)
Member (A)


(Narinder Kumar)
Member (J)

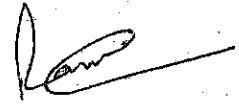


S.T.R. NO:- 34-42/ATVAT/14/1848-55
in Appeal No. 1025-1033/ATVAT/10

Dated: 10/1/22.

Copy to:-

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|---|----------------|
| (1) VATO (Ward-99) | (6) Dealer |
| (2) Second case file | (7) Guard File |
| (3) Govt. Counsel | (8) AC(L&J) |
| (4) Secretary (Sales Tax Bar Association) | |
| (5) PS to Member (J) for uploading the judgment on the portal of
DVAT/GST, Delhi - through EDP branch. | |
| (9) Commissioner (T&T) | |



REGISTRAR

