
(2024) 01 CESTAT CK 0037

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 52454 Of 2015

M/S Virgin Atlantic Airways Ltd

APPELLANT

Vs

Commissioner Of Central Excise, Delhi II

RESPONDENT

Date of Decision : 11-01-2024

Acts Referred:

Service Tax (Determination Of Value) Rules, 2006 — Rule 5(1), 6, 88
Airport Authority Of India Act, 1994 — Section 22

Citation : (2024) 01 CESTAT CK 0037

Hon'ble Judges : Dilip Gupta, President; P.V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : Nagesh Kumar, Amrish Dhawan, Harsh Vardhan

Final Decision : Partly Allowed

Judgement

P.V. Subba Rao, Member (T)

1. M/s. Virgin Atlantic Airways Ltd.[the appellant] filed this appeal to assail the order-in-original dated 24.3.2015 [. impugned order] passed by the Commissioner of Service Tax, New Delhi whereby the proposals made in three show cause notices [SCN] issued to the appellant were decided and demands of service tax totaling Rs. 6,24,75,401/- was confirmed along with interest and penalties were imposed.

The three SCNs are as follows:

- a) SCN dated 19.10.2011 covering the period 1.5.2006 to 31.3.2010 demanded service tax of Rs. 2,79,88,641/- on Passenger Service Fee, Admin fee and Airport Taxes.
- b) SCN dated 20.04.2012 covering the period 1.4.2010 to 31.3.2011 demanded service tax of Rs.1,26,29,530/- on PSF, Admin fee and Airport Taxes.
- c) SCN dated 28.9.2012 covering the period 1.4.2011 to 31.3.2012 demanded service tax of Rs. 2,18,57,410/- on Passenger Service Fee, Admin fee and Airport

Taxes.

2. We have heard Shri Nagesh Kumar, learned counsel for the appellant assisted by Shri Amrish Dhawan and Shri Harsh Vardhan, learned authorized representative for the department.

3. The appellant operates as an airlines and is registered with the service tax department for providing "Transport of passengers embarking in India for International journey by Air Service" and "Transport of Goods by Air Service". Receiving intelligence that the appellant was not paying service tax on the gross value of the services provided under the category of "Transport of passengers embarking in India for International journey by Air Service", officers called for information from the appellant and investigated the matter which culminated in the issue of the first SCN dated 19.10.2011, which was followed up by the two periodical SCNs dated 20.04.2012 and 28.09.2012. It was alleged in these SCNs that the appellant was paying service tax on the Basic Fare, Fuel Surcharge and Insurance Surcharge but was not paying service tax on the PSF, Admin fee and Airport Taxes collected from the passengers and the same was proposed to be recovered.

4. The appellant submitted its replies to the SCNs on 23.10.2012 and 11.8.2014 contending that no service tax is leviable on the PSF, Admin fee and Airport Taxes. However, the demands were confirmed as proposed in the SCNs and hence this appeal.

5. Of the three amounts in dispute, it has been held by this Tribunal in several decisions that service tax cannot be levied on the Passenger Service Fee (PSF) and Airport Taxes. In *Austrian Airlines versus Commissioner of Service Tax, New Delhi* [2020 (35) G.S.T.L. 213 (Tri. - Del.)], following several precedent decisions, it was held as follows:

"3. We have considered the rival submissions made by both the sides and have also perused the record of appeal. We find that matter is no longer resintegra as several decisions on the same issue have already been passed by this Tribunal. Some of the decisions passed by this Tribunal in recent past are as given below :-

(i) *Austrian Airlines versus Commissioner of Service Tax* [2017 (6) G.S.T.L. 344 (T)] ;

(ii) *Lufthansa German Airlines versus Commissioner of Service Tax* [2016 (43) S.T.R. 636 (T)] ;

(iii) *Continental Airlines INC versus Commissioner of Service Tax* [2016 (45) S.T.R. 449 (T)] ;

(iv) *United Airlines versus Commissioner of Service Tax* [2017 (52) S.T.R. 492 (T)] ;

(v) *American Airlines versus Commissioner of Service Tax* [2016 (45) S.T.R. 226 (T)] ;

(vi) Lufthansa German Airlines versus Commissioner of Service Tax [2017 (51) S.T.R. 192 (T)] ;

(vii) Austrian Airlines versus Commissioner of Service Tax [2017 (7) G.S.T.L. 379 (T)] ; and

(viii) Lufthansa German Airlines versus Commissioner of Service Tax [2018 (17) G.S.T.L. 241 (T)].

4. The relevant extract of the decision in the case of Lufthansa German Airlines (supra) is given here below :

"6. Heard both sides and considered the submissions. We find that the short issue involved in the matter is that, whether PSF and Airport charges collected by the appellant are to be included in the service provided by them under the category of Transportation of Passengers by Air services or not. Learned authorized representative has heavily relied on the decision in the case of Air Canada versus CST, New Delhi (supra). We find that in the case of Air Canada, the period involved is May, 2006 to September, 2007 and the appellant has failed to give documentary evidence that they have shown these expenses separately or not. The same is extracted below:

"5. Learned counsel for the appellant submitted a part of Passenger Air Tariff General Rules, 2010. It is submitted that this is the mandate for the members of IATA. The said compilation indicates country-wise taxes and fee to be paid by the Airlines. While we note that any amount collected from the passenger specifically identified for the particular service, to be rendered by other than the appellants, are not to be included in the gross value, it is necessary to establish with documentary evidence the background of such fee or taxes, legal term of contractual obligation to collect and pay the amount on actual basis. These documentary evidences are not forthcoming in the present appeal. Further, we also note that reliance placed by the appellant on the decided cases can be of help in the present case only when the facts are established. We also note that any claim for exclusion on the basis of acting as pure agent can be made only if all conditions for such concept are fulfilled. Similarly, it is seen that the present inclusion is not on the basis of provisions of Rule 5(1) of Service Tax (Determination of Value) Rules, 2006. The said rule mentions about expenditure or cost incurred by the service provider in the course of providing taxable service. In the present case, we are not dealing with any expenditure or cost incurred by the appellant in providing any service. Their claim is that these amounts (PSF and Airport taxes) are collected on behalf of the Airport Authority. In the absence of supporting evidence and also the crucial fact that the same is transmitted on actual basis without any mark up/tax element involved, has not been established in the present case. Here, we also note that the Tribunal in Continental Airlines Inc.[2015-TIOL-1481-CESTAT-DEL] and a few other cases held that PSF and airport taxes are not includible in the taxable value of airlines. It was recorded that these charges were collected by the airlines on behalf of

airports and were paid to them and, therefore, are not includible in the assessable value for the purpose of levy of service tax. Unless, these facts are established the ratio cannot be universally adopted for all airlines. As, already noted, categorical evidences are not forthcoming in the present appeal, in spite of specific query by the Bench.

6. Accordingly, we find that the appeal cannot be sustained due to failure to establish the facts. Accordingly, the same is dismissed.”

7. The appellant is relying on Rule 6 of the Service Tax (Determination of Value) Rules, 2006, which has been amended with effect from 22-2-2010 which reads as under :-

“Rule 6. Cases in which the commission, costs, etc., will be included or excluded.
—

(2) Subject to the provisions contained in sub-rule

(1), the value of any taxable service, as the case may be, does not include —

(v) the taxes levied by any Government on any passenger travelling by air, if shown separately on the ticket, or the invoice for such ticket, issued to the passengers.”

We find that Airport Tax has been collected by the appellant as per section 22 of Airport Authority of India Act, 1994 which empowers the authority to charge fees for the amenities given to the passengers and visitors at any Airport. Further, the PSF has been charged in terms of Aircraft Rules, 1937, wherein Rule 88 of the said Rules, authorise the licensee to collect fees to be called as Passenger Service Fee from the embarking passengers at such rates as the Central Government may specify, and is also liable to pay for security component to any Security Agency designated by the Central Government for providing the security service. We find that the said tax has been collected by the appellant and same has been shown separately on the tickets. Therefore, the appellant has complied with the condition of Rule 6 of Service Tax (Determination of Value) Rules, 2006 and the same are not includible in the assessable value of service provided by the appellant, as the impugned period is, post 27.02.2010 and the said issue has been examined by this Tribunal in the appellant's own case wherein this Tribunal has made it clear that these charges are not to be included in the assessable value of the services provided by the appellant relying on the decision in the case of Continental Airlines versus CST, New Delhi (supra).

Moreover, as per the exemption Notification No. 12/2010, dated 12-2-2010, statutory taxes charged by any Government on Air passengers would be excluded from the taxable value for the purpose of levy of tax and therefore, the service tax is not payable by the appellant.

8. In view of the above analysis, we hold that Passenger Service Fee (PSF) and Airport Tax are not includible in the assessable value of the services provided by

them. Therefore, the impugned order deserves no merit, accordingly, the same is set aside. Appeal is allowed with consequential relief”.

5. In view of above, since in the case of appellant in earlier case the matter has been decided accordingly, as above, we hold that the order-in-original is without any merit and, hence, same is set aside and appeal is allowed”.

6. As far as the Admin fee is concerned, learned authorised representative relies on Continental Airlines Inc. versus Commissioner [2016 (45) S.T.R. 449 (Tri. – Del.)] in which it was held that service tax is leviable on the pre-ponement and postponement charges collected by the assessee because they were collected for rendering the services in connection with the service of transportation of passengers by air service. However, demand only for the normal period of limitation was upheld in that case. Revenue’s appeal against this decision was admitted by the Supreme Court [2016 (45) S.T.R. J 208 (S.C.)] but the order of the Tribunal has not been stayed or set aside.

7. Learned counsel for the appellant submits that the entire demand of the service tax in the SCNs is based on the information provided by the appellant. The appellant never said that it was collecting any admin fee and it was wrongly added by the Commissioner in paragraph 7 of the first SCN. Therefore, the submission of the learned authorised representative that it was collecting Admin fee which is in the nature of pre-ponement, postponement or cancellation charges is not correct.

8. We are of the opinion that this is a fact to be verified by the Commissioner and if no Admin fee is collected by the appellant at all, the question of levying service tax on it does not arise.

9. In view of the above, we set aside the impugned order insofar as the demand of service tax on PSF and Airport Taxes is concerned and remand the matter to the Commissioner to examine if the appellant had collected any admin fee at all and if so, the purpose for which it is collected and if service tax can be levied as per the law prevalent during the period and the precedent decisions. Consequently, we set aside the interest and penalties in the impugned order.

10. The appeal is partly allowed setting aside the demand of service tax on PSF and Airport Taxes. However, the matter is remanded to the Commissioner for verification whether the appellant had collected any admin charges during the relevant period and if so, the taxability.