

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

Reserved on: August 31, 2017
Date of decision: September 12, 2017

+ **ST.REF. 4/2004**

AIR INDIA LTD. Petitioner
Through : Mr. Mukul Gupta, Sr. Advocate
with Mr. Tushar Gupta and Mr. Vibhor Garg,
Advocates
versus

COMMISSIONER OF SALES TAX Respondent
Through : Mr. Sanjoy Ghose, ASC for
GNCTD with Mr. Urvi Mohan, Mr. Rhishabh
Jetley, Advocates.

WITH

+ **ST.REF. 1/2015**

AIR INDIA (FORMERLY KNOWN
AS INDIAN AIRLINES) Petitioner
Through : Mr. Mukul Gupta, Sr. Advocate
with Mr. Tushar Gupta and Mr. Vibhor Garg,
Advocates
versus

COMMISSIONER OF SALES TAX, DELHI Respondent
Through : Mr. Sanjoy Ghose, ASC for
GNCTD with Mr. Urvi Mohan, Mr. Rhishabh
Jetley, Advocates

WITH

+ **ST.REF. 2/2015**

AIR INDIA (FORMERLY KNOWN
AS INDIAN AIRLINES) Petitioner
Through : Mr. Mukul Gupta, Sr. Advocate
with Mr. Tushar Gupta and Mr. Vibhor Garg,

Advocates
versus

COMMISSIONER OF SALES TAX, DELHI ... Respondent
Through : Mr. Sanjoy Ghose, ASC for
GNCTD with Mr.Urvi Mohan, Mr.Rhishabh
Jetley, Advocates

AND

+ **ST.REF. 3/2015**

AIR INDIA (FORMERLY KNOWN
AS INDIAN AIRLINES) Petitioner

Through : Mr. Mukul Gupta, Sr. Advocate
with Mr.Tushar Gupta and Mr.Vibhor Garg,
Advocates
versus

COMMISSIONER OF SALES TAX, DELHI Respondent
Through : Mr. Sanjoy Ghose, ASC for
GNCTD with Mr.Urvi Mohan, Mr.Rhishabh
Jetley, Advocates

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

ORDER

1. The Petitioner, Air India Ltd. (hereafter 'Air India') is involved in offering air transportation services. As part of running its business, it sells scrap, depleted parts and sometimes even out-dated or unused aircraft. The question that arises is whether it is liable to pay sales tax on such sales, under the Delhi Sales Tax Act, 1975 ('DST Act').

2. The judgment of this Court in *Commissioner of Sales Tax vs. DTC, 1996 III AD (Delhi) 462* (hereafter 'DTC') is heavily relied upon by the Petitioner to submit that the Petitioner's services are no different from that of the Delhi Transport Corporation ('DTC') and hence it is not liable to pay sales tax. The Respondent relies upon several judgments of various High Courts and the Supreme Court, passed in relation to the Railways to argue that the Petitioner is liable to pay sales tax on the sales effected by it.

3. Initially the Petitioner had challenged the assessment made for Assessment Year ('AY') 1994-95 which resulted in ST. Ref. 4/2004. Thereafter the Petitioner challenged the assessments made for AYs 1995-96, 1996-97 and 1997-98 which resulted in ST. Ref. 1/2015, ST. Ref. 2/2015 and ST. Ref. 3/2015.

Brief Facts

4. The Petitioner is engaged in the services of civil aviation including the running of aircraft, ferrying of passengers and goods through air routes in both the domestic and international sectors. Till 1974, the Petitioner was registered with the Sales Tax Authorities as a dealer only in respect of its catering business and thereafter, only in relation to providing canteen facilities to its staff. The Respondents sought to re-assess the Petitioner's returns on account of sales made by it in respect of unserviceable (rejected) air craft and unserviceable stores and spare parts arising in the course of its main activity, namely - civil aviation.

AY 1994-95

5. Re-assessments were sought to be made by the Department in respect of the sales activity of the Petitioner in AY 1994-95 and thereafter in AYs 1995-96, 1996-97 and 1997-98. The assessment proceedings finally resulted in appeals before the Appellate Tribunal, Sales Tax, Delhi (*hereinafter referred to as 'the Tribunal'*), which upheld the assessment.

6. Before the Tribunal, the contention of the Petitioner was that its main activity is of running the aircraft and providing services of carriage of passengers and goods, which does not constitute sale of goods in Delhi. Hence it was not amenable to sales tax. According to the Petitioner, the sales of spare parts etc. and scrap, which was incidental and ancillary to its main activity, would also therefore not be amenable to sales tax. The Petitioner contended that it was registered for a limited activity and sale of used aircraft and scrap being not connected with the activity for which it was registered i.e. running of canteens, was not amenable to sales tax.

7. The Tribunal in its order dated 12th January, 2003, upheld the assessments for the AY 1994-95 and observed as under:

“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.”

8. Thus, according to the Tribunal, the case of the Petitioner is different from the judgment in *DTC (supra)* and the *Andhra Pradesh State Road Transport Corporation, Hyderabad v. The Commercial Tax Officer, Hyderabad – III [1971] 27 STC 42* (hereafter ‘*AP Road Transport Corporation*’). The Tribunal also held that the said transactions of sales are incidental and ancillary to or in connection with the Petitioner's 'business' as an airline as established in *DTC (supra)* and *AP Road Transport Corporation (supra)*. The Tribunal concluded that the Petitioner is a dealer ‘*qua the sale of old aircrafts/scraps*’.

9. The Tribunal, on an application by the Petitioner, by order dated 21st May, 2003 referred the following questions to this Court for AY 1994-95:

“(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?"

AYs 1995-96, 1996-97 and 1997-98

10. The assessment for AYs 1995-96, 1996-97 and 1997-98 were upheld by the Tribunal by order dated 5th June, 2015. Thereafter, upon an application made on 20th August, 2014 for AYs 1995-96, 1996-97 and 1997-98, the Tribunal by its order dated 7th May, 2015, referred the following additional questions of law to this Court:

"5. 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?"

6. 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?"

11. On 7th December, 2015, ST. Ref. 1/2015, ST. Ref. 2/2015 and ST. Ref. 3/2015 were tagged alongwith ST. Ref. 4/2004. Thus, the present

4 reference cases require decision in the above 6 questions referred to this Court.

Provisions of the Delhi Sales Tax Act, 1975

12. The question that arises is whether the Petitioner is a ‘dealer’ which is ‘carrying on business of selling goods in Delhi’ in respect of the scrap including old and unserviceable aircraft, spare parts and other material? Sections 2 (c) and 2 (e) of the DST Act read as under:

“2(c) ‘business’ includes –

- (i) any trade, commerce or manufacture of any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern; and*
- (ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern;*

(e) ‘dealer’ means any person who carries on business of selling goods in Delhi and includes –

- (i) the Central Government or a State Government carrying on such business;*
- (ii) an incorporated society (including a co-operative society), club or association which sells or supplies goods, whether or not in the course of business, to its members for cash or for deferred payment or for commission, remuneration or other valuable consideration;*
- (iii) a manager, factor broker, commission agent, del credere agent or any mercantile agent, by whatever name called, and whether of the same*

description as hereinbefore mentioned or not, who sells goods belonging to any principal whether disclosed or not; and
(iv) an auctioneer who sells or auctions goods belonging to any principal, whether disclosed or not and whether the offer of the intending purchaser is accepted by him or by the principal or a nominee of the principal.”

Petitioner's Submissions

13. Mr. Mukul Gupta, learned Senior Counsel appearing for the Petitioner, relies heavily on the judgment of this Court in ***DTC (supra)*** to submit that the activity of the Petitioner is no different from that of the DTC. Mr. Gupta submits that the word “such” as appearing in Section 2 (c) (ii) of the DST Act takes colour from the main activity referred to in Section 2 (c) (i) of the Act and cannot be alienated therefrom.

14. According to Mr. Gupta, the Petitioner is not a dealer as per the provisions of the DST Act inasmuch as, the business for which the Petitioner is registered is not in any manner connected with the sale of old aircraft and scrap. Moreover, the predominant activity in terms of the test as laid down in the ***DTC (supra)***, being civil aviation, the sale of scrap and old aircraft is only ancillary thereto and not amenable to sales tax. The predominant activity being non amenable to sales tax the sale of scrap and spare parts is also not amenable to sales tax.

15. Mr. Gupta further contends that civil aviation services provided by the Petitioner is not a “business” as per Section 2 (c) of the DST Act. Mr. Gupta sought to reinforce his submissions by placing reliance upon *State of Tamil Nadu vs. Burma Shell Oil Co. Ltd., [1973] 31 STC 426 (SC)* (hereafter ‘*Burma Shell Oil Co. Ltd.*’) and *State of Gujarat vs. Raipur Manufacturing Co. Ltd., [1967] 19 STC 1 (SC)* (hereafter ‘*Raipur Manufacturing Co. Ltd.*’).

16. Mr. Gupta further relied upon statistics and data related to the sale of scrap which showed that it constituted merely 0.047%, 0.068%, 0.020% and 0.036% of the total revenues in AYs 1994-95, 1995-96, 1996-97 and 1997-98 respectively. Even aircraft sale constituted only 0.150%, 0.552%, 1.211% and 0.00% of the total revenues in AYs 1994-95, 1995-96, 1996-97 and 1997-98 respectively. Freight business was also only 4.57%, 4.79%, 4.54% and 4.38% of the total revenues in AYs 1994-95, 1995-96, 1996-97 and 1997-98 respectively. Thus according to Mr. Gupta the revenues from sale of scrap and aircraft were minuscule as compared to the overall revenues of the Petitioner. Moreover, the Petitioner cannot change its nature of activity without the prior approval of the Central Government and hence it is not very different from a statutory corporation. Thus the predominant part of the Petitioner's revenues was from the main business of carrying passengers and baggage services which is not amenable to sales tax.

17. Mr. Gupta took pains to distinguish the recent judgment of this Court in *Citi Bank vs. Commissioner of Sales Tax, 2015 SCC Online*

Del 14023. He submitted that the activity sought to be taxed in the said case was part of the business of the bank. He urges this Court to apply and follow *Raipur Manufacturing Co. Ltd. (supra)* and *Burma Shell Oil Co. Ltd. (supra)* which are judgments followed by this Court in *DTC (supra)*. He further urges that a similar view has also been taken by the Supreme Court in *State of Tamil Nadu vs. Board of Trustee of the Port of Madras, AIR 1999 SC 1647* (hereafter 'Port of Madras'). He thus submits that both *DTC (supra)* and *Port of Madras (supra)* apply squarely to the facts of the present case and hence no sales tax would be payable by the Petitioner.

Respondent's Submissions

18. On the other hand, Mr. Sanjoy Ghose, learned Additional Standing Counsel appearing for the Respondents, submits that the present case is clearly distinguishable from the case of *DTC (supra)* inasmuch as DTC is a statutory corporation which is statutorily barred from selling spare parts, equipments or accessories. He relies upon Section 19(3) of the Road Transport Corporation Act, 1950. He further relies upon judgments of various Courts passed in respect of Railways to argue that the activities of Air India are akin to the business carried out by Railways. He specifically relies upon –

- *The District Collector of Stores, Northern Railway, Jodhpur vs. Assistant Commercial Taxation Officer AIR 1976 SC 489,*
- *Controller of Stores Central Railway vs. Commissioner of Sales Tax Maharashtra State, Bombay, [1995] 99 STC 222 (Bom),*

- ***Member Board of Revenue West Bengal vs. Controller of Stores, Eastern Railway, Calcutta AIR 1989 SC 1468,***

19. Mr Ghose also referred to the decision in ***M.P. State Road Transport Corporation vs. Commissioner of Sales Tax, 1995 MPLJ 696*** (hereafter '*MPSRTC*') and that this decision is authority to the proposition that the profit motive or percentage of sales is not relevant to determine the taxability of an activity. It is sufficient that the same amounts to carrying on business, as held in the case of ***MPSRTC*** (*supra*). Mr. Ghose further submits that Air India Ltd and Indian Airlines Ltd are no longer statutory corporations. They have reverted to being companies incorporated under the Companies Act, 1956 after the repeal of the Air Corporation Act, 1953. He submits that there is no embargo on them from carrying on any kind of business and thus factually, the decision in ***DTC*** (*supra*) is distinguishable in its application to the case above. Mr Ghose submitted that if Clause (ii) of Section 2(c) were to be interpreted as being dependent on the applicability of Clause (i) then it would be rendered totally redundant.

Reference to Larger Bench

20. After hearing arguments of the parties, it is clear that the various cases cited before us deal with different modes of transportation, namely, road, rail and air. The services offered by all these entities include transportation of passengers and goods. In respect of Railways, the consistent view of the Supreme Court as well as the laws of Bombay and Madhya Pradesh is that the Railways is amenable

to tax on the sale of spares, scrap etc. The *DTC (supra)* decision of this Court takes a contrary view in respect of road transport following the decision of the Andhra Pradesh High Court while disagreeing with the views of the High Courts of Madras and Madhya Pradesh. In *DTC (supra)*, this Court observed “*We express our disagreement with the decision of the Madhya Pradesh High Court*”.

21. The decision in *DTC (supra)* is in the context of road transport. It was related to the context of the DTC being a statutory corporation. Here we are clearly with a company, which has ceased to be a statutory corporation. The activity of operating aircrafts to carry passengers and cargo is no doubt a commercial activity but it is not the ‘business’ for which the petitioner is registered as a dealer under the DST Act. However, the sale of scrap is not merely occasional but a regular and routine activity which will continue so long as the Petitioner continues to provide air transportation services. The important question thus, is whether the ‘dominant activity’ test would be a relevant criteria for determining whether under Section 2 (c) (ii) the sale of scrap constitutes ‘business’? This question does not appear to have arisen in the context of air transport earlier. It appears to the Court that the decision in *DTC (supra)* will need to be reconsidered. In the light of the above discussion, the following question of law ought to be decided by a Full Bench of this Court.

"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?"

22. Since the answer to the above question might involve a reconsideration of the judgment of the Division Bench of this Court in *DTC (supra)*, these petitions be placed before the Hon'ble the Acting Chief Justice for constitution of a larger Bench for that purpose.

S.MURALIDHAR, J

PRATHIBA M. SINGH, J

SEPTEMBER 12, 2017

Pk/j