

Read : Application dt.25-07-2013 by M/s. Bharat Petroleum Corporation Ltd.
Heard : Shri Vatsal Thakar, Assistant Manager, Finance.

PROCEEDINGS

(under section 56(1)(f) and 56(2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2013/Adm-6/39/B- 1

Mumbai, dt. 5/11/2015

An application is received from M/s. Bharat Petroleum Corporation Ltd., having address at Bharat Bhavan, 4 & 6, Currimbhoy Road, Ballard Estate, P.B. No.688, Mumbai-400001. The details about the transaction as appearing in the application is thus -

"We, Bharat Petroleum Corporation Ltd. (BPCL), are a Public Sector Undertaking, engaged in the business of refining and marketing of various petroleum products. In the state of Maharashtra, we are having Refinery in Mumbai at Mahul (Chembur) and various marketing locations, storage points, depots, Airforce Stations at Mumbai/Pune/Nagpur/Nanded Airports which are duly registered under the Maharashtra Value Added Tax Act, 2002 ('MVAT Act') as well as the Central Sales Tax Act, 1956 ('CST Act') with the TIN Nos. being 27160318214V and 27160318214C respectively.

We have entered into an agreement with Etihad Airways from 1st April 2013, for the purpose of refueling Etihad Airways aircrafts at Mumbai, Delhi, Bangalore and Trivandrum Airports. Etihad Airways operates only international flights to and from the above mentioned Indian Airports. In April 2013, Etihad agreed to buy a 24% stake in Jet Airways as part of the UAE carrier's equity partnership strategy. At Mumbai, from 31st May 2013, Etihad Airways had operated Indian Registered aircrafts (Jet Airways Aircraft), for their schedule international flights. BPCL has supplied ATF to Etihad Airways at nil sales tax rate even though aircraft used by Etihad Airways is Indian registered.

On this backdrop, it is requested to determine u/s.56(1)(f) of the MVAT Act as to, whether ATF supplies can be made at nil sales tax rate to Etihad Airways using Indian registered aircraft of Jet Airways."

02. CONTENTION

The contention as appearing in the application is thus -

"In pursuance of the Convention on International Civil Aviation opened for signatures at Chicago on the 7th December, 1944 and the Air Services Agreement or Air Transport Agreements entered into by India with parties to the said Convention, it is necessary to grant exemption from levy of taxes and duties on fuel and lubricants filled into receptacles forming part of any aircraft of any country or countries (other than India) which is or are parties to the said Convention or Agreement.

Therefore, in exercise of the powers conferred by section 3 of the Foreign Aircraft (Exemption from Taxes and Duties On Fuel and Lubricants) Act, 2002 (36 of 2002), the Central Government has issued notification dated 18th November 2002, that the fuel and lubricants filled into receptacles forming part of any aircraft registered in any other countries (other than India) which is a party to the said Convention or which has entered into the said Agreement with India, and operating a scheduled or non-scheduled international air service to or from India shall be exempted from levy of all taxes and duties in India whether levied by the Central Government or the State Government, as the case may be. Accordingly Maharashtra Value Added Tax Act contains provision under section 8 (2) which read as follows. In accordance with the notification issued by the Central Government in exercise of its powers under section 3 of the Foreign Aircraft (Exemption from Taxes and Duties on Fuel) Act, 2002 (36 of 2002), no tax shall be levied on the sales of fuel and lubricants which are filled into receptacles forming part of any aircraft registered in a country other than India, if-

- (a) the said country is a party to the Convention on International and Civil Aviation, 1944; and*
- (b) the said country has entered into an Air Services agreement with India; and*
- (c) the aircraft is operating on a scheduled or non-scheduled service to or from India.*

United Arab Emirates (UAE) is party to the convention on International and Civil Aviation, 1944 and has entered into an Air Services agreement with India. Etihad Airways being National Airline of UAE is eligible to get ATF supplies at Nil sales tax rate.

Under Section 5 (5) of Central Sales Tax Act, 1956, Government of India has notified Designated Indian Carriers which can purchase ATF for the purpose of their international flight and such purchase shall be deemed to take place in the course of export of goods out of the territory of India. Thus no taxes will be applicable to such sale/purchase. As per Notification dated 7th June 2005, Jet Airways has been specified as one of the designated Indian carrier for the purpose of section 5 (5) of Central Sales Tax Act, 1956. Thus BPCL sales ATF at nil sales tax rate when the purchase is made by Jet Airways for their international flight.

In view of the foregoing, according to us, intention of the Government is not to impose local taxes on the countries signatory to the convention on the fuel and consumables for international air traffic. Jet Airways and Etihad Airways

both are entitled to nil sales tax rate for their international flights. In our humble submission, the benefit of nil sales tax rate should be extended to Etihad Airways even though the aircraft used is Indian registered."

The applicant has submitted a copy of sales invoice no.227376 dt.15.7.2013 evidencing sale of ATF and relevant notifications. Through submission dt.22.08.2013, it is requested to determine the following point in addition to the earlier question :

"Since all the supplies being made to Etihad Airways are from Bonded ATF, whether the said supplies can be made at NIL VAT under Entry 50(b) of Schedule A appended to Maharashtra Value Added Tax Act, 2002 which reads as below: "Goods Supplies from Bond to Foreign Going Ships & Aircrafts- NIL VAT"

In our view the words here are "goods" which covers ATF as well. ATF as a matter of fact, if the same is sold from bond to a foreign going Aircraft shall be exempt from VAT as per VAT schedule entry mentioned above. Hence in our opinion ATF sold from Bond by BPCL to Etihad Airways shall be eligible for exemption."

Through submission dt.22.08.2013, it is stated thus -

"As you are well aware that Government of India has relaxed FDI norms for Aviation Sector. Due to the said development more & more foreign airlines are planning to invest into various Indian Carriers. The lead in this regards has been taken by Etihad Airways, which has already invested in Jet Airways (both being large ATF customers of BPCL). As a result of the said developments these foreign airlines have started operating more & more scheduled flights from India to avail full benefit of their investment. In such a scenario they need to purchase ATF from any one of the 3 Oil Marketing Companies (OMC's) including BPCL. Unless the Taxation aspect of the said transaction is not clarified, there shall be lack of clarity as to the rate of tax which needs to be charged for ATF supplies for these Foreign Airlines which can have huge Financial Implications on OMC's. We have already entered into long term fuel supply contract with Etihad in this regards. As your self is already aware that Fuel cost consist of nearly 40% of the operating cost for any airlines, the issue assumes further significance from view point of Aviation Industry as well."

03- HEARING

Shri Vatsal Thakar, Asstt. Manager-Finance attended the hearing on dt.29.10.2013. The submission made as regards the applicable schedule entry/provision is thus :

- a) Section 8(2) of the MVAT Act - It was stated that as per this section, no tax shall be levied on fuel and lubricants filled into receptacles forming part of any aircraft registered in a country other than India, if the conditions of party to the Convention of International Civil Aviation, Air Services Agreement within India and scheduled and non-scheduled services to or from India are fulfilled.
- With respect to the above claim, it was brought to the notice of the applicant that the aircrafts to which fuel (ATF) is being supplied by BPCL are registered in India. Therefore, the applicant would not fulfill the condition laid down in section 8(2) of the Maharashtra Value Added Tax Act, 2002 (MVAT Act, 2002).
- In response to the same, it was argued that as per rule 18 of the Central Excise Rule, 2002, export includes goods shipped as provisions or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft. As per Article 286 of the Constitution, no law of State shall impose a tax on sale or purchase of goods in the course of import or export of goods into India. Therefore, the transaction is an export transaction.
- b) Entry 50(b) of Schedule-A - "goods supplied from bond to foreign going ships and aircrafts". With regard to this entry, it is brought to the notice of the applicant that the 'goods' in the above entry are the 'goods' which would be for further sale/export to another country and not for consumption on board the aircraft. In the present case, the ATF is refuelled for the onward journey of the aircraft and not for any further sale.
- With regard to the above, the same argument as in point (a) is advanced. It is further stated that the goods i.e. the ATF are supplied against Excise Bond, which is submitted to the Range Superintendent for removal of goods against nil duty.
- c) The applicant has invited attention to section 5(5) of the Central Sales Tax Act, 1956 (CST Act, 1956) as per which - if any designated Indian carrier purchases ATF, such purchase shall be deemed to take place in the course of export of goods out of the territory of India. Designated Indian carriers include Jet Airways. The transaction is thus:
1. Etihad is using aircrafts of Jet Airways for its international run flights.
 2. Supply of ATF by BPCL to Jet Airways aircraft would have been exempted u/s.5(5) of the CST Act if billing was made to Jet Airways. Also if the aircraft used by Etihad is registered in countries other than India, the supply of ATF to Etihad would have been exempted u/s.8(2) of the MVAT Act, 2002.
 3. However, the peculiar circumstances of Indian registered aircraft being used on foreign run by foreign airline has arisen because of liberalization of FDI Rules.
- d) It is requested to give prospective effect to the determination if the determination order is determined against the applicant.

A submission on certain points was agreed to be provided during hearing. By letter dt.31.10.2013, additional time was requested to give the submission. By submission dt.11.11.2013, it has been submitted thus –

1. BPCL submits that supplies of ATF are made from bond to Foreign going aircrafts (in this case sales to Etihad Airways) and these sales are exempt under Entry 50(b) of Schedule A. We state that ATF is removed from Refinery under General Bond Form CT-2 to Aviation Fueling Station which is a registered Export Warehouse having registration no.AAACB2902MXM038 for the purpose of Rule 20 of the Central Excise Rules,2002.
2. We would further like to bring to your notice that the said warehousing facility is extended to Specified Petroleum Products as per Notification No.17/2004-Central Excise dated 4th September, 2004. Central Board of Excise & Customs has given necessary clarification in support of the same vide Circular No.804/1/2005-CX. The following documents are submitted :
 - a) Notification No. 17/2004-Central Excise dated 4th September 2004.
 - b) Circular No 804/1/205-CX dated 4th January, 2005.
 - c) Copy of Bond in Form CT-2 towards procurement of excisable goods under Procedure for Export Warehousing (Rule 20 of Central Excise Rules, 2002)
 - d) Copy of Form A.R.E. 1 (bearing no. BP 537 dated 13.07.2013) towards Application of Removal of Excisable Goods for Export by Air, duly endorsed by Customs Preventive Officer. The said application is made towards export of ATF for sale made to Flight NO.EY 205 of Etihad Airways.
 - e) Copy of Shipping Bill (bearing no. BP 537 dated 13.07.2013) for Export of Duty Free Goods duly endorsed by Customs Preventive Officer which is corresponding to the above A.R.E-1.
 - f) Copy of Shipping Manifest (bearing EGM no. 19450) duly endorsed by Customs Preventive Officer which is corresponding to the above A.R.E. 1.
 - g) Copies of Commercial Invoice drawn on Etihad Airways towards supplies of ATF made at NIL Excise Duty along with corresponding Fuel Delivery Notes.
3. Sale of ATF to Foreign Going Aircraft being considered as Export under Central Excise Rule,2002
 - a. BPCL has also claimed that as per Explanation to Rule 18 of Central Excise Rules, 2002 which states as "Export includes goods shipped as provision or stores for use on board a ship proceeding to foreign Port or supplied to a foreign going aircraft." Thus as per Article 286 of the Indian Constitution "No law of State shall impose, or authorize the imposition of tax on the sale or purchase of goods where such sale or purchase takes place in the course of export of goods out of, the territory of India."
 - b. The word Stores has not been defined under Central Excise Act,1944 however as per Notification No.17/2004-Central Excise dated 4th September, 2004 Stores shall have the meaning assigned to them in section 2 of the Customs Act, 1962. As per Section 2(38) of the Customs Act,1962 stores includes fuel, Thus combined reading of the said provision establishes that the Sale of ATF to foreign going aircraft shall be considered as Export. Also to be noted that for every supply of ATF made to foreign going aircrafts Shipping Bill & Shipping Manifest are duly prepared & endorsed by Customs Preventive Officer, which are primary requirement for any export shipment.

Through the above correspondence of dt.11.11.2013, the applicant has also placed the submission of M/s. Etihad Airways who are aggrieved by the proposed imposition of sales tax on ATF sold to them and which is as under :

- M/s Etihad Airways are the flag carrier of the United Arab Emirates and has been designated by the Government of the United Arab Emirates as a scheduled "designated carrier" under the provisions of the India- UAE bilateral Air Services Agreement.
- During the period 30 May, 2013 to 13 September, 2013, Bharat Petroleum sold ATF to M/s Etihad Airways. Full details of the sales of ATF to Etihad are enclosed.
- We have sought a clarification regarding whether Sales Tax would have to be levied on ATF sold to Etihad Airways at Mumbai for its foreign going aircraft operating international flights, solely on the ground that the aircraft have been leased from M/s Jet Airways and hence the ownership of the said aircraft is registered in India even though the aircraft are in operation under the fleet of Etihad Airways and registered on the Airlines Operating Certificate and Operation Specification of Etihad Airways in the UAE with the United Arab Emirates General Civil Aviation Authority (GCAA).

Specific Facts

- Bharat Petroleum has operations in Mumbai enabling it to sell bonded fuel to Airlines.
- In April 2013, Jet Airways and Etihad Airways entered into arrangements whereby Jet Airways would provide an A330 to Etihad Airways, for use on Etihad Airways' international passenger flights.
- Jet Airways and Etihad Airways agreed that this arrangement would be undertaken via a 'wet lease' arrangement, which is an agreement whereby the lessor (Jet Airways) would provide the aircraft and crew to the lessee (Etihad Airways), and that Etihad Airways would be responsible for determining the routes and schedule of the aircraft, the fueling of the aircraft, and the aircraft would be operated under a Etihad Airways call sign.

- In order for the aircraft to be able to be utilized by Etihad Airways, the following steps were required to be undertaken:
 1. Jet Airways and Etihad Airways agreed to the commercial aspects of the lease, and that the aircraft would be operated on Etihad's international passenger routes.
 2. Jet Airways had to first obtain a letter of 'No Objection' from the Government of India Director General of Civil Aviation (DGCA) granting approval for Jet Airways to lease the aircraft to Etihad Airways.
 3. The DGCA and the United Arab Emirates General Civil Aviation Authority (GCAA) had to enter into a Memorandum of Understanding confirming the lease.
 4. Etihad Airways had to amend its Aircraft Operators Certificate and the supporting Operating Specifications to specifically register the Jet Airways aircraft as under its authorised operations.
- Once these steps were completed, Etihad Airways was entitled to operate the Jet Airways aircraft on its international routes.
- During the period of the wet lease, Etihad Airways leased one A330 identified by Number VT-JWJ. This aircraft was the primary aircraft leased during the period. At times when this aircraft was unavailable (e.g. due to scheduled maintenance), Jet Airways made other aircraft available to fulfill the conditions of the lease. These secondary aircraft are identified by Number VT-JWF and VT-JWM. The secondary aircraft was also entered onto Etihad Airways Aircraft Operators Certificate and the supporting Operating Specifications.
- Etihad Airways engaged the aircraft on the following repeated schedule:
 1. Abu Dhabi, United Arab Emirates (AUH) to Mumbai, India (BOM)
 2. Mumbai, India (BOM) to Abu Dhabi, United Arab Emirates (AUH)
 3. Abu Dhabi, United Arab Emirates (AUH) to Moscow, Russia (DME)
 4. Moscow, Russia (DME) to Abu Dhabi, United Arab Emirates (AUH)

The ATF purchased from Bharat Petroleum was purchased by Etihad Airways after arrival in India, for the sole use of an international flight, and was exported out of India.

- As discussed above, Etihad Airways only operates scheduled flights on international routes.

Discussion of Relevant Law – Section 8(2) of Maharashtra VAT Act 2002

- Section 8(2) of Maharashtra VAT Act, 2002 specifically provides that no tax shall be levied on sales of fuel to foreign going aircraft subject to fulfilling certain conditions.
- The sale of Aviation Turbine Fuel by M/s BPCL to M/s Etihad Airways fulfills all the conditions as will be seen from the submissions below.

➤ Registration of aircraft in a country other than India – i.e. UAE

- It is submitted that the sale of ATF in question was made by M/s BPCL to M/s Etihad Airways an airline registered in the UAE.
- The respective regulatory authorities of every country, issues an Air Operator Certificate/Permit which permits the airline to operate its aircraft on approved routes.
- The Air Operator Certificate/Permit also defines the specific aircraft that the airline is permitted to operate and registers such aircraft in the Operations Specifications which form a part of the Air Operator Certificate/Permit.
- Accordingly all such aircraft so registered are required to comply with the operational requirements of the country where the Airline is registered.
- The aircraft used over the period of the lease, were under the operational control of Etihad Airways and accordingly the Indian DGCA issued a 'No objection Certificate' and made it a condition that the "Operator shall get the subject aircraft endorsed for the wet lease on their AOP." Accordingly Etihad Airways got the said aircraft registered on their Air Operator Certificate (also known as Air Operator Permit or AOP).
- The Air Operator Certificate of Etihad Airways including the Operating Specification which in column N at item No 6 clearly mentions that the aircraft leased from Jet Airways is on Etihad Airways' Air Operator Certificate/Operations Specifications in the UAE and a copy of the same is enclosed. The said AOC has been issued by the United Arab Emirates General Civil Aviation Authority.
- A copy of the NOC issued by the Indian DGCA prior to permitting Jet Airways to wet lease the aircraft to Etihad Airways is also enclosed. The said letter also clearly establishes that given that the aircraft in question were being wet leased for a short term and would be endorsed in the UAE, the aircraft would have to comply with the rules and regulations of the State of the Operator i.e. the UAE. That is, the process of entering the aircraft on EY AOC and Operating Specification registers the aircraft in the UAE for authorised operations.
- Hence this clearly establishes that the aircraft in question operated by Etihad Airways in the UAE meets the requirement of the condition of "registered in a country other than India" for the purposes of Section 8(2) of the Maharashtra VAT Act, 2002 during the period they were under a wet lease from Jet Airways to Etihad Airways.
- It is important to appreciate that it is necessary to accept this concept in order for the correct application in Section 8(2) of the Maharashtra VAT Act, 2002 to apply. Section 8(2) of the Maharashtra VAT Act, 2002, is based on the bilateral and multilateral commitments of India with respect to international aircraft operations and the Foreign Aircraft (Exemption from Taxes and Duties on Fuel) Act, 2002 (36 of 2002) which was enacted to give effect to these commitments.

➤ The country of the operator is a party to the Convention on International Civil Aviation at Chicago, 1944



- It is submitted that Etihad Airways is a carrier registered in the UAE and UAE is a signatory to the Convention on International Civil Aviation at Chicago, 1944. A copy of the list of signatories evidencing the same is enclosed.
- **The country of the airline has entered into an Air Services agreement with India;**
 - It is submitted that Etihad Airways is a carrier registered in the UAE. India and the UAE have entered into a Bilateral Air Services Agreement. In fact the said Agreement also has a specific provision which exempts airlines of India and UAE on the basis of reciprocity from levy of any taxes on fuel. The relevant extract from Article 9 of the said agreement is enclosed herewith.
 - As per the said Article 9 of the India -UAE Bilateral Air Services Agreement, customs duties and national duties and charges on aircraft, fuel and lubricating oils are to be exempt. The benefits of exemptions are to apply to "designated airlines" which are operating aircraft in the course of an "international air service".
 - The terms "Designated airline" and "International air service" have been defined in Article 1(4) and Article 1(7) of the Bilateral Air Services Agreements respectively and the relevant extract is reproduced hereinbelow for ready reference:
"Article 1 Definitions:
○ 'Designated Airline' means an Airline designated and authorized in accordance with Article 3 (designation and authorization) of this Agreement;"
○ 'International Air Service' means as per the definition of Article 96 of the Convention on International Civil Aviation which reads 'an Air Service that passes through over the territory of more than one State';"
 - From the above it will be seen that Etihad Airways is a designated Airline and the operation of its aircraft on wet lease from Jet Airways constitutes an international air service. This can also be established from the Operating Authorization issued by the Indian DGCA under the said bilateral Agreement to Etihad Airways as a "Designated Scheduled carrier" which is annexed herewith.
- **The aircraft is operating on a scheduled service to or from India.**
 - It is submitted that the subject aircraft for which ATF was purchased by Etihad Airways from M/s BPCL have been operated on international scheduled services between points in India and abroad and not between any points within India. The details of the scheduled flights operated with the said aircraft by Etihad Airways for which fuel was purchased are enclosed herewith.
 - The flight operated with the said aircraft for which ATF was purchased from BPCL were as per the international schedule approved by the Indian DGCA and a copy of the same is enclosed. The same may be compared and verified with the details of the flights undertaken by Etihad Airways with the subject aircraft as per the list furnished above.
 - In conclusion it is clear that all the four requirements as set out in Section 8(2) of the Maharashtra VAT Act, 2002 have been met by Etihad Airways in the subject transaction and hence it is eligible for the exemption from payment of Sales Tax on ATF purchased from BPCL for its international flights as provided therein.

➤ **Example of Air India**

- It is a known fact that during the Haj period, Air India takes on wet lease aircraft from other countries and such aircraft are registered outside India but are operated by Air India under their own call sign. The ATF sold to Air India for such flights operated abroad are exempt from sales tax as the same amounts to export and accordingly no such taxes are levied in accordance with the provisions of the Chicago Convention as well as the bilateral provisions of the countries to which Air India operates. Hence, it will be seen that any view to the contrary in the case of ATF sold to Etihad Airways by BPCL will also be inconsistent and contrary to international conventions apart from being contrary to the provisions of the Maharashtra VAT Act, 2002.

➤ **International Agreements**

- Article 9 of the Bilateral Air Services Agreement provides on the basis of reciprocity to designated airlines, certain exemption with respect to customs duties and national duties and charges on aircraft, fuel and lubricating oils. The relevant extract of Article 9 is reproduced hereinbelow for ready reference:
"Article 9: Each party shall on the basis of reciprocity exempt a designated airline of the other Party to the fullest extent possible under its national law from customs duties, excise taxes, inspection fees and other national duties and charges on aircraft, fuel, lubricating oils, consumable technical supplies, spare parts including engines, regular aircraft equipment, aircraft stores (including but not limited to such items of food, beverages and liquor, tobacco and other products destined for sale or to be used solely in connection with the operation or servicing of aircraft) and other items, such as printed ticket stock, air waybills, any printed material which bears the insignia of the company printed thereon and usual publicity material distributed free of charge by that designated airline intended for use or used solely in connection with the operation or servicing of aircraft of the designated airline of such other party operating the agreed services."
- In view of the above it is clear that the intention of the Government of India was to promote international air services between India and the UAE. In achieving this objective, no distinction or specific requirement was provided with respect to registration of ownership of aircraft for availing of exemptions by the aircraft of any other country or countries. The intention had always been to promote the international operations of the designated Airlines in the Contracting States i.e. India and UAE.
- The above clearly establishes that Etihad Airways is eligible for the said exemption even as per the India-UAE bilateral. Any interpretation contrary to the same should be eschewed as the same will amount to



violating India's international Agreements including the Convention on International Civil Aviation, 1944, the India UAE Bilateral Air Services Agreement and the Foreign Aircraft (Exemption from Taxes and Duties on Fuel) Act, 2002 (36 of 2002) and the notifications issued by the Government of India to implement the same in accordance with the provisions for implementing India's International commitments as envisaged in Article 253 of the Constitution of India.

- In the circumstances aforesaid, the arrangement of the leased aircraft operated by Etihad Airways should be viewed in a manner which is consistent with all other legislations, rules, notifications, Acts and India's international Agreements and not in a manner which negates or violates the same.
- Clearly Etihad Airways is exempt from the applicability of taxes and is as such qualifies for exemption of custom duties and other charges such as Sales Tax and more particularly sales tax on ATF bought by it from BPCL for its foreign going flights operated under the provisions of the Indo-UAE Bilateral Air Services Agreement based on its status as a Designated Carrier.

Additional Support – Domestic taxes cannot be exported

- **Domestic taxes cannot be exported- Maharashtra VAT Act, 2002 does not permit levy of taxes in the course of export of goods.**

○ It is also pertinent to add that on the same underlying basis the Maharashtra Government does not levy sales tax on ATF sold to Designated Indian Carriers when they are operating as a 'foreign going aircraft' as it is treated as an export. Hence, it would lead to an anomaly that an Designated Indian Carriers operating as a "foreign going aircraft" is not subject to sales tax on ATF sold to it, however, a foreign carrier operating a "foreign going aircraft" is made to pay sales tax on ATF sold to it, though it does not operate any flight on any domestic sector within India.

○ It is an accepted fact in tax jurisprudence that taxes cannot be exported. Holding a view that ATF on sales tax be levied on fuel which is filled in an aircraft which is a foreign going aircraft and operating from points between India and points abroad or in other words is being exported in pursuance of international air transport, would be contrary to accepted norms of tax jurisprudence and would also be contrary to the provisions of the Maharashtra VAT Act, 2002 itself.

○ Section 8 of the Maharashtra Value Added Tax Act, 2002 provides that Nothing in the Act or the rules or the notifications shall be deemed to impose or authorize the imposition of a tax on any sale or purchase of any goods, where such sale or purchase takes place, in the course of the export of the goods out of India.

○ It is important to note that it has been categorically stated that when goods are exported then the provisions of the said Act, rules and notification shall be read and construed accordingly.

○ Clearly far from diluting the international export of ATF or foreign going nature of the aircraft in the instant case where Etihad Airways operates aircraft leased from Jet Airways, the following facts in fact further strengthen the applicability of the exemption envisaged under the Maharashtra VAT Act, 2002 and the above mentioned International Conventions and Agreements and reiterates the fact that the ATF is being exported.

a) The fact that the flight is operated between points in India and abroad and not within India and hence the ATF is exported.

b) That the flights are operated not under any domestic license but under the provisions of the Indo UAE Bilateral Air Services Agreement as per which Etihad Airways has been designated as an international scheduled carrier and has been granted bilateral rights to operate such international flights between destinations in India and abroad.

The call sign/flight number under which the aircraft operates belongs to Etihad Airways and not to Jet Airways and the aircraft is on the Air Operator Certificate of Etihad Airways in the UAE. This has been done after the Indian DGCA gave a No Objection Certificate for the same and made it mandatory for the aircraft to comply with the Rules and Regulations of UAE and to further have the details of the leased aircraft entered in the AOC registered with the UAE General Civil Aviation Authority.

d) The routes under which Etihad Airways operates such flights utilizing the services of leased aircraft of Jet Airways are based on permission which has been granted by the office of the DGCA based on the provisions of the Indo-UAE Bilateral Air Services Agreement, Route Schedule and not as a domestic carrier.

e) The sectors on which such flights are operated to which ATF is sold can be checked from the schedule approval granted by the DGCA and a copy of the latest schedule approval is enclosed herewith for ready reference which clearly shows that these are international flights and not domestic flights.

f) The intent of any notification including the DGCA Notification dtd 18 November, 2002 annexed hereto based on which Section 8(2) of the MVAT Act, 2002 has been incorporated was to give effect to India's Bilateral commitments which has been clearly mentioned in the Act as well as the impugned Notification and any interpretation to the contrary would amount to a violation of India's bilateral commitments to the Government of UAE in terms of the Indo-UAE Bilateral Air Services Agreement as well as to the Chicago Convention. Such an international would also be contrary to Article 253 of the Constitution of India.

g) The Government of India is trying to develop civil aviation and to make India an aviation hub and any erroneous interpretation of India's International multi-lateral and Bilateral commitments will militate against the Government stated policy apart from leading to a violation of such commitments and the Constitution of India.

h) It would be incorrect to interpret the registration requirement based purely on the basis of ownership, as in case Air India were to lease an aircraft which is registered abroad and to operate it on an international



sector, its international flights would be subject to domestic levies on fuel by foreign countries that it would fly to which per our understanding has never been the case as it would amount to violation of bilateral agreements and international conventions.

Tamil Nadu Government has taken a consistent and constructive stand in accordance with international conventions and India's bilateral arrangements:

- It is pertinent to note that Tamil Nadu Government has vide its General Order No.85 dt.23.09.2008 clearly stipulated that ATF sold by oil companies to aircraft operated by any other country are exempt from payment of Tamil Nadu Value Added Tax. The said notification does not draw any distinction on the basis of registration and the only requirement is to get a certificate from the airline to the effect that the aircraft is being operated by a country which is (a) a party to the convention to the international civil aviation and (b) that it is operating scheduled international air services to/from India. A copy of the same is enclosed.
- It is prayed that considering the intention of the Aircraft Act which has been the basis for framework of the state laws, the sales to an aircraft operated by foreign airlines is not taxable, based on spirit of Chicago conventions. And therefore in the above instance Tamil Nadu VAT authorities has correctly interpreted the same.

Through submission dt.26.02.2014, while reiterating the earlier submission, additional points were made on the issue of Article 83 bis and other points thus :

- The article was introduced to facilitate the international charter and leasing of aircraft and allows the State of Registry to transfer all or part of its functions and duties to the State of Operator of the aircraft (with the latter's agreement).
- It may be noted that Article 83 bis recognizes that while in the normal course an aircraft is registered in a particular country, however when the obligations that are cast under such registration are transferred to the regulatory authorities of another country and the aircraft is under the operational control of another country by virtue of an agreement between the regulatory authorities of the Lessor and Lessee countries then such an arrangement can be construed to amount to the registration being deemed to have been transferred to the country of the Lessee. The Convention recognizes that mere registration on paper when the actual functions of registration have been transferred to the regulatory authorities of another country have to be recognized and construed accordingly to ensure better regulation and oversight over air safety in the case of international lease, charter or interchange of aircraft.
- The DGCA has taken cognizance of this Article 83 bis vide its AIC 05/2008 dated 3rd June, 2008 wherein it has laid down the "Requirement for operation of Scheduled Air Services to/from India by Foreign Airlines with Leased Aircraft" to ensure air safety.
- Clause 1.4 and Clause 1.6 of the aforesaid DGCA Circular requires the Agreement inter se between the parties to record the functions and duties in case of a lease.
- It may hence be noted that the DGCA Circular clearly in so many words states that the "State of the Operator" stands substituted for the "State of the Registry" or in other words the aircraft is deemed to be registered in the country of the Lessee, which in the present case is the UAE. Hence it will be seen that Article 83 bis further supports the stand that Etihad Airways was duly entitled to obtain the fuel tax exemption as provided in the India-United Arab Emirates Air Services Agreement by virtue of the substitution or deemed registration.
- It will be appreciated that if the duties and obligations which flow from registration itself are transferred and the registration remains theoretical and when the de facto functions stand transferred to the regulatory agencies of another country then the same amount to for all intents and purposes to deem the registration to have been transferred to the Lessee country.
- The reference to the substitution in the DGCA circular referred to above makes it clear that the intent is to substitute the registration functions and thereby make it a deemed registration for all intents and purposes, including availing of and applicability of exemptions under the Indo-UAE Bilateral Air Services Agreement.
- The Call sign that the leased aircraft operated under were Etihad Call sign EY and not the Jet Airways call sign. The use of the Call sign of Etihad is based on the legal requirements of the Government of UAE. In this context the CAAP 47 document issued by the UAE Civil Aviation Authority is of the import as it lays down the legal requirements for the use of a UAE carrier call sign. Point 6.2.3 of the said document is reproduced herein below for ready reference:

"The AOC and Operation Specifications is the Legal document that is issued by Civil Aviation Authority for Commercial Air Transportations business which is also member of ICAO.

The Operations Specifications describes the Area of operations, Type of Aircraft, Operational/Navigation authorization (e.g. Low Visibility, RVSM, MNPS, etc.) etc and Wet Leased aircraft listed in the AOC. This authorized the Foreign Operator to use UAE AOC Call sign for foreign registered aircraft, for other lease longer than 5 days, GCAA prior approval required. There may be a case where the arriving aircraft enter UAE Airspace with Foreign call sign (e.g. flight bound from USA may use their call sign or N (November registered call sign, and during departure, carrying UAE Operator / lessor, the lessee may use UAE Operator call sign.

Unless it is specified in the Operation Specifications or Authorized by the GCAA Flight Operations, no Operator shall use any other call sign from other state member without GCAA approval unless in accordance with CAROPS 1/3.165 par d."

From the above it is clear that the AOC and the Operations Specifications are as per UAE regulatory authorities the mandatory legal documents which officially indicate the regulatory control of the UAE authorities of leased aircraft. Only after the regulatory authorities are satisfied is the permission for endorsement of a foreign leased aircraft given for inclusion of its details on this Legal Document i.e. the AOC and Operations Specifications which inter alia grants recognition to such foreign aircraft as being under the regulatory control of the UAE authorities and thereby granting it permission to use a UAE call sign. It is important to note here that the call sign used by the aircraft operated by Etihad in question was the Etihad call sign, thereby conclusively proving its recognition as a foreign aircraft deemed to be registered and under the regulatory control of the UAE authorities in accordance with the Agreement of transfer between the Government of UAE and the government of India. Hence not only do the Indian authorities recognize this substitution of registration functions over aircraft leased to foreign carriers, even the UAE authorities recognize the same and accordingly exercise the regulatory oversight functions with respect to flight operations with such leased aircraft as though they were deemed to be registered in the UAE."

By submission dt.04.03.2014, it was stated thus –

- "In relation to the aircraft that Jet Airways wet-leased to Etihad Airways, the UAE GCAA was not required to issue a "No Objection Certificate" prior to entering the aircraft on to Etihad's Air Operating Certificate and the Operations Specification Certificate.
- The UAE GCAA require the Indian DGCA "No Objection Certificate" as evidence to support the entry of the aircraft on to Etihad's Air Operating Certificate and the Operations Specification Certificate.
- The entry on to the Air Operating Certificate and the Operations Specification Certificate is approval from the UAE GCAA, and as such, a separate "No Objection Certificate" is not required in relation to this activity."

04. OBSERVATIONS

I have gone through the exhaustive arguments placed on record and have taken care to reproduce them in full. The issue before me is a transaction between BPCL and Etihad Airways, the rate of tax on which is sought to be determined. From the submission, it is seen that the applicant has laid claim in respect of the following provisions and entries:

- | | |
|-----|------------------------------------|
| I | Section 8(2) of the MVAT Act, 2002 |
| II | Section 5(5) of the CST Act, 1956 |
| III | Entry 50(b) of Schedule A |

I begin by discussing in the order as above :

II] SECTION 8(2) OF THE MVAT ACT, 2002

The provision reads thus :

"In accordance with the notification issued by the Central Government in exercise of its powers under section 3 of the Foreign Aircraft (Exemption from Taxes and Duties on Fuel) Act, 2002 (36 of 2002), no tax shall be levied on the sales of fuel and lubricants which are filled into receptacles forming part of any aircraft registered in a country other than India, if-

- (a) the said country is a party to the Convention on International and Civil Aviation, 1944; and
- (b) the said country has entered into an Air Services agreement with India; and
- (c) the aircraft is operating on a scheduled or non-scheduled service to or from India."

The above provision has been enacted in view of the following Notification dt.18.11.2002 of the Ministry of Civil Aviation, Government of India :

"S.O.3720 – Whereas, in pursuance of the Convention on International Civil Aviation opened for signatures at Chicago on the 7th December, 1944 and the Air Services Agreements or Air Transport Agreements entered into by India with parties to the said Convention, it is necessary to grant exemption from levy of taxes and duties on fuel and lubricants filled into receptacles forming part of any aircraft of any country or countries (other than India) which is or are parties to the said Convention or Agreement;

Now, therefore, in exercise of the powers conferred by section-3 of the Foreign Aircraft (Exemption from Taxes and Duties On Fuel and Lubricants) Act, 2002 (36 of 2002), the Central Government hereby notifies that the fuel and lubricants filled into receptacles forming part of any aircraft registered in any other countries (other than India) which is a party to the said Convention or which has entered into the said Agreement with India, and operating a

scheduled or non-scheduled international air service to or from India, shall be exempted from levy of all taxes and duties in India whether levied by the Central Government or the State Government, as the case may be."

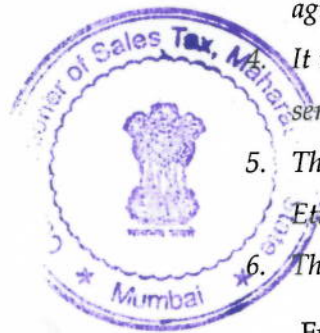
A bare reading of the above provision reveals that the exemption from tax is available under the following circumstances :

1. *The exemption is in respect of sale of fuel and lubricants.*
2. *The fuel and lubricants are filled into receptacles forming part of any aircraft.*
3. *The aircraft should be registered in a country other than India.*
4. *The aircraft is operating on a scheduled or non-scheduled service to or from India.*
5. *Such country –*
 - a. *should be a party to the Convention on International and Civil Aviation, 1944; and*
 - b. *has entered into an Air Services agreement with India;*

It goes without saying that all the above conditions should be satisfied and the exemption cannot be availed to the exclusion of any of the conditions. The facts of the present case are :

1. *India and United Arab Emirates (UAE) are parties to the Convention on International and Civil Aviation, 1944.*
2. *The applicant informs that India and UAE have entered into an Air Services agreement.*
3. *BPCL and Etihad Airways have agreed for supply of fuel for consumption in Aircraft through an agreement effective from the 1st April 2013.*
4. *It is informed that the aircraft for which ATF is purchased is operating on international scheduled services between points in India and abroad and not between any points within India.*
5. *The transaction dt. 15.07.2013 is in respect of sale of Aviation Turbine Fuel (ATF) to the aircraft of Etihad Airways.*
6. *The aircraft for which ATF is purchased belongs to Jet Airways and is registered in India.*

From the above, it can be seen that all the conditions except the 6th are in keeping with the requirements of section 8(2) as outlined on pre-page. The applicant has placed submission on record to the effect that the fact as mentioned at point no.6 is not true i.e the aircraft for which ATF is purchased is registered outside India and not in India. It has been argued that *the aircrafts have been leased from M/s Jet Airways and hence the ownership of the said aircraft is registered in India even though the aircraft is in operation under the fleet of Etihad Airways and registered on the Airlines Operating Certificate and Operation Specification of Etihad Airways in the UAE with the United Arab Emirates General Civil Aviation Authority (GCAA).* The submission has elaborated on the steps which are taken to put in the leased JET aircraft into operation. At the cost of repetition, I would reproduce herein the submission pertaining to the issue of 'registration of aircraft' on the basis of which it has been tried to stress that the aircraft in question operated by Etihad Airways meets the requirement of the condition of "*registered in a country other than India*" for the purposes of section 8(2) of the MVAT Act, 2002. The relevant portion appears thus :



- The respective regulatory authorities of every country, issues an Air Operator Certificate/Permit which permits the airline to operate its aircraft on approved routes.
- The Air Operator Certificate/Permit also defines the specific aircraft that the airline is permitted to operate and registers such aircraft in the Operations Specifications which forms a part of the Air Operator Certificate/Permit.
- All such aircrafts so registered are required to comply with the operational requirements of the country where the Airline is registered.
- The aircraft used over the period of the lease, were under the operational control of Etihad Airways and accordingly the Indian DGCA issued a 'No objection Certificate' and made it a condition that the "Operator shall get the subject aircraft endorsed for the wet lease on their AOP." Accordingly Etihad Airways got the said aircraft registered on their Air Operator Certificate (also known as Air Operator Permit or AOP).
- The Air Operator Certificate of Etihad Airways including the Operating Specification which in column N at item No 6 clearly mentions that the aircraft leased from Jet Airways is on Etihad Airway's Air Operator Certificate/Operations Specifications in the UAE. The said AOC has been issued by the United Arab Emirates General Civil Aviation Authority.
- A copy of the NOC issued by the Indian DGCA prior to permitting Jet Airways to wet lease the aircraft to Etihad Airways also clearly establishes that given that the aircraft in question were being wet leased for a short term and would be endorsed in the UAE, the aircraft would have to comply with the rules and regulations of the State of the Operator i.e. the UAE. That is, the process of entering the aircraft on EY AOC and Operating Specification registers the aircraft in the UAE for authorised operations.

Thus, it is the argument that the amendment by Etihad Airways in its Aircraft Operator Certificate (AOC) and the supporting Operating Specifications (OS) amounts to registering of the Jet Airways aircraft in UAE. I have perused the AOP issued to Etihad Airways by the United Arab Emirates General Civil Aviation Authority. It certifies thus -

"This certificate certifies that : Etihad Airways is authorized to perform: commercial air carrier operations as defined in the attached operations specification in accordance with the operations manual and UAE Civil Aviation Regulations."

A bare look at the above certificate and it can be deduced that the same is not a document for registration of an aircraft. It is a document which authorizes Etihad Airways to perform air carrier operations. ***It cannot, by any stretch of imagination, be said to be a document awarding registration to any aircraft.*** The OS is a document referred to in the AOP. It contains details of Aircraft Models, Type of Operations, etc. On page 2 of this document, Row 'G' pertains to "Authorized Aircraft" and has details about the Aircraft Registration. Now, if the argument put forth is to be accepted that OS was a document granting registration, does it make any sense that the said document itself provides details of Aircraft Registration. Further, there is Row N which is about 'Aircraft Lease'. It enumerates certain details under the title - '*Following are the authorised operations under lease agreement:*'. At sr. no.7, the following is mentioned - 'Jet Airways India Limited, Airbus A330-202: VTJWJ, VT-JWM'. What the above makes out is that the OP is a document which mentions the details of the operations of Etihad Airways such as follows :

- A Authorized Aircraft Manufacture make model series
- B Type of Operations
- C AWO [RRVR(m)]: (visibility)
- D Approach : (Precision Non Precision Circling)
- E PBN(Performance Based Navigation)
- F CNS (Com, Nav & Surveillance)
- G Authorized Aircraft (Aircraft Registration)
- H Destinations
- K ULR Operations
- L Maintenance



- M Telephony & Three Letter designators
- N Aircraft Lease
- P Other Approval
- Q Remarks
- R Personnel approved by Authority
- S Point of Contact

Thus, as the name 'OS' suggests, it contains specifications as above and does not grant registration to Aircrafts. A letter dt.28.05.2013 issued by the officials at the Director General of Civil Aviation (DGCA) is about giving 'NO Objection' for wet lease of Airbus to Etihad Airways. One of the points mentioned therein is – *"The Operator shall get the subject aircraft endorsed for the wet lease on their AOP."*. An AOC is a permit and its purpose is to certify that specified commercial air transport air operations are authorized by the national aviation authority of a country which has been delegated to grant permission for air transport service to and from a country. The above details on the AOP are in fulfillment of the aforementioned point.

An aircraft registration is a unique alphanumeric string that identifies a civil aircraft, in similar fashion to a licence plate on an automobile. In accordance with the Convention on International Civil Aviation, all aircrafts must be registered with a national aviation authority. The Aircraft Rules, 1937 of India define 'Foreign Aircraft' as *an aircraft registered in a country other than India*. Thus, there is a concept of registration within and outside a country. Rule 30 pertains to registration and reads thus :

"The authority empowered to register aircraft and to grant certificate of registration in India shall be the Central Government. The certificate of registration shall include the following particulars, namely:

Type of aircraft, constructor's number, year of manufacture, nationality and registration marks referred to under these rules, full name, nationality and address of the owner, usual station of aircraft and the date of registration and the period of validity of such registration:

Provided that in the case of a leased aircraft, the certificate of registration shall also include the validity of the lease and the names, nationalities and addresses of the lessor and the lessee."

I would refer herein to sub-rule (4) of rule 1 and rule 56 of the Aircraft Rules, 1937 thus –

"(4) These rules shall not apply to aircraft registered in India and operated pursuant to an agreement for the lease, charter or interchange of aircraft or any similar arrangement by an operator who has his principal place of business or if he has no such place of business, his permanent residence in a contracting State, provided that an agreement has been reached between the Government of India and the Government of that contracting state in regard to transfer of functions and duties pursuant to Article 83 bis of the Convention. The extent of non-application of these rules to such aircraft shall be as per the agreement between the two Governments."

"56. Indian aircraft operating outside India- *Where an aircraft registered in India is operating in a country outside India, the aircraft, or any of its components or items of equipment shall not be modified, repaired, replaced, inspected or overhauled except by or under the supervision of, and certified by -*

- (a) in the case of a Contracting State, a person who is approved for the purpose by the appropriate authority of Contracting State in accordance with the minimum requirements adopted in pursuance of the Convention and recognized by the Director-General as sufficient for the purpose;*
- (b) in the case of a country other than a Contracting State, a person who possesses qualifications which are recognized by the Director-General as sufficient for the purpose.*

Note:- For the purpose of this rule, foreign aircraft falling under sub-rule(3) of rule 1 shall be deemed as aircraft registered in India and Indian aircraft falling under sub-rule(4) of rule 1 shall be deemed as aircraft not registered in India."

A conjoint reading of both the above rules brings us to the position that *an aircraft registered in India and operated pursuant to an agreement for lease thereof to another Country shall be deemed as an aircraft not registered in India if an agreement has been reached between*

the Government of India and the Government of that contracting state in regard to transfer of functions and duties pursuant to Article 83 bis of the Convention. I would refer to the website of the DGCA for Article 83 bis -

"Article 83 bis *

Transfer of certain functions and duties

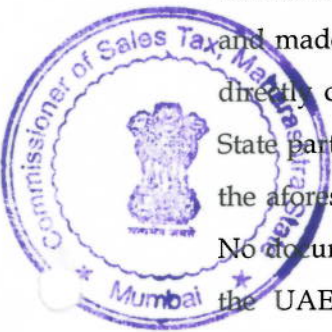
- (a) *Notwithstanding the provisions of Article 12, 30, 31 and 32(a) when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft under Articles 12, 30, 31 and 32(a). The State of registry shall be relieved of responsibility in respect of the functions and duties transferred.*
- (b) *The transfer shall not have effect in respect of other contracting States before either the agreement between States in which it is embodied has been registered with the Council and made public pursuant to Article 83 or the existence and scope of the agreement have been directly communicated to the authorities of the other contracting State or States concerned by a State party to the agreement.*
- (c) *The provisions of paragraph (a) and (b) above shall also be applicable to cases covered by Article 77."*

The website explains the asterisk "*" thus :

"On 6 October 1980 the Assembly decided to amend the Chicago Convention by introducing Article 83 bis. Under Article 94(a) of the Convention the amendment came into force on 20 June 1997 in respect of States which ratified it. As on 30 June, 2003 there were 139 contracting States party to it. India ratified it on 5 August, 1994. Next amendment was signed at Montreal on 10 May, 1984 which entered into force on 1 October, 1998. This has 125 States as party to it. India has not ratified it."

Thus, what Article 83 bis says is that if there is an Agreement to the effect of transferring all or part of functions and duties as State Registry, the State of registry shall be relieved of responsibility in respect of the functions and duties transferred. However, the Article further clarifies that merely entering into the aforesaid Agreement would not amount to transfer of functions unless the same has been registered with the International and Civil Aviation Council and made public pursuant to Article 83 or the existence and scope of the agreement have been directly communicated to the authorities of the other contracting State/States concerned by a State party to the agreement. The applicant was queried as to the compliance of requirements of the aforesaid Article. However, the applicant has not yet produced any evidence to that effect. No document of any kind is brought on record to show that the aircraft has been registered in the UAE. The documents pertaining to registration of aircrafts were called for by letter dt.25.10.2013. However, by letters of various dates, the applicant has requested time to produce details in support of the claim under Section 8(2) of the MVAT Act, 2002. The last letter in this regard was of dt.13.06.2014 requesting further time. The applicant was finally asked by letter dt.23.12.2014 to submit the needful details failing which orders would be finalized. However, till the date of this order, no details have been produced. I am convinced that no supporting documents are available with the applicant to support his claim.

There is a Circular (referred to as CAR-Civil Aviation Requirements, Issue II November 2009, Issue III 29th January, 2010) issued by the DGCA on the subject of 'Criteria for leasing of aircraft by Indian Operators'. The same was issued to address the growing trend in aircraft leasing and thereby the operational bases of aircraft sometimes transcending national boundaries and the difficulty for the State of Registry to exercise the desired control over its aircraft. In order



to address this concern and to ensure adequate regulatory control is exercised over aircraft, the Convention on International Civil Aviation was amended to incorporate Article 83 *bis* therein. The aforesaid Circulars in point 2 thereof deal with 'Operations with leased aircraft' wherein it is stated thus -

"Having regard to the above, it has been decided that no Indian operator shall take any aircraft on lease or give any aircraft on lease to a foreign operator without permission from the Director General of Civil Aviation, who may take a decision regarding the need to conclude an agreement between Government of India and the State of Registry or the State of the Operator under Article 83 bis of the Convention."

Thus, the above para in the Circular is in compliance of the requirements of provisions as contained in the Article 83 *bis* and Aircraft Rules, 1937. The Circular states that the leased aircraft shall be entered in or deleted from the Air Operator's Permit of the Indian Operator. The letter dt.28.05.2013 from the DGCA officials also informs the same to Jet Airways in pursuance of Jet's communication to DGCA about the wet lease to Etihad Airways. Accordingly, the OS of Etihad Airways has a mention of the Jet Airways aircraft and the Aircraft is referred to therein in the same manner as an Indian registered aircraft. The applicant has given copies of the Fuel Delivery Notes raised by BPCL. These mention the details of the aircrafts which have been refueled. The registration details of the aircraft as mentioned therein are 'VT-JWJ' or 'A6-DCA'. The break-up of the supplies of ATF which have been charged at Rs.18,64,090/- in sales invoice no.227376 dt.15.7.2013 are thus :



Date	A/C Regn. Numbers	Qty.	Amount
11.07.2013	A6DDA	19210.00	869632.00
12.07.2013	A6DCA	7650.00	346026.00
15.07.2013	VTJWJ	14300.00	648432.00
TOTAL		41160.00	1864090.00

Thus, wherever the aircraft is Indian registered, details of the same are, accordingly, mentioned. The corresponding effect of deletion from the AOC of Jet Airways is not brought on record. However, I have to hasten to say that this does not amount to registration of the aircraft in the other country. We have seen the explicit provisions in the Rules as to how an Indian aircraft falling under sub-rule(4) of rule 1 is deemed as an aircraft not registered in India. To effect the transfer, the parties must enter into transfer agreements, which must state specifically, the duties and functions to be transferred. No such document has been brought on record as to what are the functions and duties of the State Registry which have been transferred. Further, the applicant has not brought to my notice any provision for registration/deemed registration in UAE of foreign registered aircrafts operated on lease by UAE operators.

The applicant has invited attention to a Circular (SI. No. 05/2008 dt.03.06.2008) issued by DGCA on the subject of 'Requirements for operation of scheduled air services to/from India by foreign airlines with leased aircraft'. A para therefrom at point 2.2 says thus -

"2. Requirements for operation with a leased aircraft

2.1 Pursuant to Article 83 bis of the Convention and relevant provisions of the Aircraft Rules, 1937, it has been decided that before undertaking operation of scheduled air services to/from India with an aircraft registered in a

State other than the State of the Operator, the designated airlines shall be required to make a request in writing to the Director General of Civil Aviation for grant of permission for such operations. The application shall be made at least 15 days prior to the proposed date of operations with leased aircraft and shall be accompanied by a copy each of the lease agreement as well as the agreement reached between the State of Registry and the State of the Operator – both being parties to Article 83 bis of the Convention – for transfer of safety oversight functions from the former to the latter.

2.2 In case the State of Registry or the State of the Operator is not a party to Article 83 bis of the Convention, or if both the States are parties to Article 83 bis but have not entered into an agreement for transfer of the safety oversight functions, the lessee airline shall be required to produce a letter from its aeronautical authorities spelling out the circumstances under which the scheduled flights are proposed to be operated with an aircraft registered in a State other than the State of the Operator. Such aeronautical authorities shall also be required to give an undertaking that they shall be responsible for the operational and safety control of the aircraft."

I have perused the above Circular and it is stated that it supersedes AIC 2/2008 dated 19.2.2008. It can be seen that the above Circular provides that where an agreement for transfer of the safety oversight functions has not been entered into, the lessee airline shall be required to produce a letter from its aeronautical authorities spelling out the circumstances under which the scheduled flights are proposed to be operated with an aircraft registered in a State other than the State of the Operator. The Circular also states that in addition to the aforesaid, the aeronautical authorities shall also be required to give an undertaking that they shall be responsible for the operational and safety control of the aircraft. The present status of the Circular in terms of it being superseded by another Circular is not known. However, the applicant has not tendered any documentary evidence of even the requirements of this Circular being duly fulfilled.

We have seen above as to what is registration of aircraft. No document showing compliance with any provision has been produced. In these circumstances, the argument tendered that *it would be incorrect to interpret the registration requirement based purely on the basis of ownership*, does not make a point when the available provisions are appreciated. It is therefore determined that the impugned transaction does not fall within the provisions of section 8(2) of the MVAT Act, 2002.

The facts and provisions being unambiguous, I refrain from dealing with any arguments as tendered by the applicant. I would, therefore, now move on to ascertain the next claim made with regard to the present transaction :

[II] SECTION 5(5) OF THE CST ACT, 1956

The provision reads thus –

"(5) Notwithstanding anything contained in sub-section (1), if any designated Indian carrier purchases Aviation Turbine Fuel for the purposes of its international flight, such purchase shall be deemed to take place in the course of the export of goods out of the territory of India.

Explanation.- For the purposes of this sub-section, "designated Indian carrier" means any carrier which the Central Government may, by notification in the Official Gazette, specify in this behalf."

As can be seen, the above provision applies to purchases by a designated Indian carrier. Etihad Airways is not an Indian carrier and therefore, there arises no question of it being notified as a "designated Indian carrier". Jet Airways has been notified under this sub-section. However, the

present transaction is between BPCL and Etihad Airways and the latter is the purchaser who is not an Indian carrier, let alone a designated one. Therefore, reliance on this sub-section is misplaced. In view thereof, I would not discuss any of the arguments made in this regard.

I now move on to discuss the next claim thus –

[III] ENTRY 50(b) OF SCHEDULE A

The schedule entry reads thus –

“Goods supplied from bond to foreign going ships and aircrafts”

The applicant has laid claim to the aforesaid schedule entry. However, I find that the product involved in the question posed for determination before me is ‘Aviation Turbine Fuel’ and there are specific entries for this particular product under the Schedules appended to the MVAT Act, 2002. The same could be seen thus –

Schedule entry	Description	Rate of tax
C-8	Aviation Turbine Fuel sold to a Turbo-prop aircraft. <i>Explanation:</i> For the purposes of this entry, "Turbo-prop aircraft" means an aircraft deriving thrust mainly from propeller, which may be driven by either turbine engine or piston engine.	5%
D-6	Aviation Turbine Fuel (Duty paid) (other than those covered by entry 8 of Schedule C and entry 11 of this Schedule).	25%
D-7	Aviation Turbine Fuel (Bonded)	30%
D-11	Aviation Turbine Fuel (Duty paid) when sold within Maharashtra excluding the geographical limits of Brihan Mumbai Corporation, Pune Municipal Corporation and Raigad District.	5%

The schedule entry C-8 is applicable to Turbo-prop aircrafts and the present aircrafts are not turbo-prop aircrafts. Therefore, the applicability of schedule entry C-8 does not arise.

The supply of the ATF in the present transaction has been done at Mumbai in Maharashtra and therefore, the schedule entry D-11 which pertains to “ATF (Duty paid) when sold within Maharashtra excluding the geographical limits of Brihan Mumbai Corporation, Pune Municipal Corporation and Raigad District” is also not applicable. This leaves the schedule entries D-6 and D-7 which pertain to ATF (Duty Paid -other than C-8 and D-11) and ATF(Bonded). The applicant has laid claim to the schedule entry A-50(b) which provides for supply of goods from Bond. Therefore, the applicant is admitting the fact that ATF, the product in the present transaction is ATF(Bonded).

The applicant has stated that supplies of ATF are made from bond to foreign going aircrafts. With regard to the claim under this entry, the applicant had invited attention to the Circular No 804/1/205-CX dated 4th January, 2005. The issue and decision as stated therein is thus –

“Issue: Oil companies have represented to say that Indian International airports normally cater to domestic as well as international flights and the supplies of ATF (Aviation Turbine Fuel) to foreign-going storage aircrafts cannot be made directly from the refinery. Further, they have reported difficulties in installing multiple storage tanks (separate for domestic and export clearances) at the site of the airport due to space constraints.....

Decision: In such cases, ATF cleared for export warehouse may be allowed to be stored in the intermediate storage tanks subject to condition that such intermediate storage tanks are used exclusively for storing export goods.

.....
Further, in view of difficulties in installing separate tanks at the airports, mixed storage of duty paid and non-duty paid goods at Aviation Fuel Station (AFS) at airports may be allowed subject to the condition that a tank-wise regular account shall be maintained about the receipt and discharge of duty paid and non-duty paid stocks of ATF.....

For bunker fuel supply, as long as the intermediate storage tanks are dedicated for supplies to foreign-going vessels, the same relaxation procedure as stated above for ATF including those of mixed bonding for foreign-going aircrafts may be adopted."

What the Circular states is that ATF supplied to foreign-going storage aircrafts are allowed to be stored at airports. By submission dt.04.03.2014, the applicant has submitted thus :

- The ATF export is in the nature of Finished Goods Export.
- In connection with the supplies made against the Invoice No.227376, we would like to clarify that the said supply has been duly made from Indian Oil Corporation Hydrant. IOCL, Sahar has already submitted AREI/Shipping Bills/Shipping Manifesto towards the said flight to Excise Department.
- BPCL makes multiple supplies of ATF to Etihad Airways as well as other Airlines in a single day. For the sake of convenience Invoices are printed on periodic basis to cover all the supplies for a particular period. In the current case Invoice No. as appearing on the Statement of Invoices relates to individual supplies being made to every flight. As far as the invoice No. as appearing on the invoices raised to the customer, the same is the actual invoice no. which covers all the supplies for the period for which the invoice is raised.
- Aircraft Delivery Receipt which is commonly known as Fuel Delivery Note in Aviation Parlance is endorsed by the Customs Preventive Officer. The endorsed copy is required to be duly submitted with the Office of the Excise Officer having Jurisdiction. In case of Invoice No.227376 all the documents pertaining to export of ATF including Endorsed Aircraft Delivery Receipts have been duly submitted with the Office of the Deputy Commissioner of Central Excise.
- Throughput Charges as charged in the invoice -Any service provided for supplying fuel to the aircraft at an Airport is an Aeronautical Service" as per Section 2(a) of the Aera Act. Throughput Charges, therefore, are levied by Airport Operator on fuel supplier for supplying fuel at their airport. This throughput Fee is passed on by fuel suppliers to airlines through fuel invoice.
- Export under Advance License or under Duty Drawback Scheme - SBPCL is following the Advance Authorization mechanism for ATF exports."
- a. BPCL has also claimed that as per Explanation to Rule 18 of Central Excise Rules, 2002 which states as "Export includes goods shipped as provision or stores for use on board a ship proceeding to foreign Port or supplied to a foreign going aircraft." Thus as per Article 286 of the Indian Constitution "No law of State shall impose, or authorize the imposition of tax on the sale or purchase of goods where such sale or purchase takes place in the course of export of goods out of, the territory of India."
- b. The word Stores has not been defined under Central Excise Act, 1944 however as per Notification No. 17/2004-Central Excise dated 4th September, 2004 Stores shall have the meaning assigned to them in section 2 of the Customs Act, 1962. As per Section 2(38) of the Customs Act, 1962 stores includes fuel, Thus combined reading of the said provision establishes that the Sale of ATF to foreign going aircraft shall be considered as Export. Also to be noted that for every supply of ATF made to foreign going aircrafts Shipping Bill & Shipping Manifest are duly prepared & endorsed by Customs Preventive Officer, which are primary requirement for any export shipment.

I have seen the above submission. I begin with the fact that the applicant has stated that supplies of ATF are made from bond to foreign going aircrafts. ATF is removed from Refinery under General Bond Form CT-2 to Aviation Fueling Station which is a registered Export Warehouse having registration no.AAACB2902MXM038 for the purpose of Rule 20 of the Central Excise Rules,2002. Now, there exists a direct entry for ATF (Bonded). The entry A-50(b) in respect of which claim has been laid is meant for 'goods' generally and does not refer to any specific or particular goods as such. Since a direct entry is available covering the impugned circumstances, I refrain from entering into any deliberations or deal with arguments as regards inclusion in the general entry. In view thereof, the impugned product would be covered by the schedule entry D-7 of the MVAT Act,2002, thereby attracting tax thereon @30%.

However, I would deal herein with the argument that the impugned transaction be treated as an export. The concept of export for the purposes of the sales tax statute is defined. There exists in the MVAT Act, 2002, a schedule entry which provides for tax rate on 'Goods supplied from bond to foreign going ships and aircrafts'. It means that the statute recognizes the situation of supply from 'Bond to foreign going ships and aircrafts' as a transaction exigible to tax within the State. And we have seen that the applicant has laid claim to this entry. The applicant's arguments are contradictory when seen that while laying claim to one entry, the transaction is treated as one entered within the State and at the same time, an alternate claim is made that the transaction is an export. Herein, I would invite attention to the case of *Burmah Shell Oil Storage And Distributing Co., of India Ltd., And Another v. Commercial Tax Officer And Others* (11 STC 764 SC). In this case, the appellant-companies, dealing in petroleum and petroleum products, maintained supply depots at airport from which aviation spirit was sold and delivered to aircraft proceeding aboard and belonging to several companies. It was held by the Hon. Apex court that the said sale is one within the state with the observations that - 'No doubt, aviation spirit is taken out of the State and also the territory of India, but it cannot be said to have been exported or delivered for consumption in some other State.' The Hon. Supreme Court in the case of *M/s. Madras Marine And Co. v. State of Madras* (1986 63 STC 169) has observed that when the goods were segregated in the bonded warehouse to be delivered to the foreign going vessels, it was not a case of export as there was no destination for the goods to a foreign country. The sale was for the purpose of consumption on board the ship. Thus it can be seen that the Hon. Apex court has held sale from a bonded warehouse to be within the state in which the same was located. In view of the aforesaid case laws and more importantly the fact that the MVAT Act, 2002 has a specific provision in the form of a schedule entry providing for levy of tax in the State of Maharashtra in respect of supplies to foreign going ships and aircrafts, the argument that sale of ATF to foreign going aircraft be considered as an 'export' does not sustain.

05. PROSPECTIVE EFFECT

The applicant has prayed for prospective effect in case the contention made by the applicant is not acceptable. I have elaborately dealt with each of the claims made by the applicant as regards the impugned transaction. The provisions are clear enough and there was no statutory mis-guidance of any kind. When the applicant themselves point to a Circular which provides for an alternate arrangement in the form of a letter and an undertaking from the aeronautical authorities of the lessee airline in situations where an agreement for transfer of the safety oversight functions has not been entered into, it shows that the applicant is aware of the provisions as have been elucidated by me. Can a claim under section 8(2) of the MVAT Act, 2002 be justified in such circumstances? The claim under section 5(5) of the CST Act, 1956 was also not

found entertainable as the same pertained to exemption to a designated airline and Etihad Airways does not hold the same status for its operations in India. I have also dealt with contradictory claims of the applicant as to the transaction being taxable under the MVAT Act, 2002 as well as being an export sale. When a specific schedule entry existed under the statute, no justification for misguidance or mis-interpretation can be considered. In view thereof, I am not inclined to consider the request for prospective effect favourably.

06. In view of the deliberations held hereinabove, it is determined thus -

ORDER

(under section 56(1)(f) and 56(2) of the Maharashtra Value Added Tax Act, 2002)

No.DDQ-11-2013/Adm-6/39/B- 1

Mumbai, dt. 5/1/2015



For reasons as discussed in the body of the order,

- a. it is determined that the sale of Aviation Turbine Fuel by the transaction dt.15.07.2013 to Etihad Airways for the supply to the aircraft registered in India for operating on international scheduled services between points in India and abroad and not between any points within India is neither a transaction under section 8(2) of the MVAT Act, 2002 nor covered under section 5(5) of the Central Sales Tax Act, 1956. It is also not an export.
- b. the impugned product would be covered by the schedule entry D-7 of the MVAT Act, 2002, thereby attracting tax thereon @30%.
- c. the request for prospective effect is rejected.


(DR. NITIN KAREER)

COMMISSIONER OF SALES TAX,
MAHARASHTRA STATE, MUMBAI