

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
1st Floor, WTC Building, FKCCI Complex, K. G. Road,
BANGLORE-560009

COURT-2

Customs Appeal No. 2998 of 2011

*[Arising out of the Order-in-Appeal No.38/2011 dated
23.05.2011 passed by the Commissioner of Customs
(Appeals), Bangalore.]*

M/s. Nuance Group (India) Pvt. Ltd.

....Appellant

Bengaluru International Airport
Alpha 3, Airline Building, 1st Floor,
Devanahalli,
Bangalore – 560 300.

Vs.

The Commissioner of Customs

....Respondent

Bengaluru International Airport,
Bangalore – 560 001.

Appearance:

Shri K. S. Naveen Kumar and
Ms. M. Mahalakshmi, Advocates
Mr. K. Vishwanath, AR

....For Appellant

.... For Respondent

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS R. BHAGYA DEVI, MEMBER (TECHNICAL)

Date of Hearing: 08.09.2023

Date of Decision: 10.01.2024

FINAL ORDER No. 20042 of 2024

Per R. BHAGYA DEVI:

The appellant M/s. Nuance Group (India) Private Limited was operating Private Bonded Warehouse and duty-free shop at Bangalore International Airport under Section 58 of the Customs Act, 1962 and they had to comply with the procedures specified in

Trade Facility No.50/2005 dated 5.4.2005. As per this Trade Facility Procedure, the appellant for every sale made from the duty-free shop should be covered by a voucher which shows the name of the passenger to whom the sale was affected, passport number, flight number of the aircraft of arrival and departure. These sale vouchers are to be countersigned by the customs officer. However, the officers investigated, it was noticed that between 17.9.2008 to 17.11.2008 the appellant had launched a promotional offer for sale of Johnnie Walker and Smirnoff brand liquor in terms of "buy JW centurion 3 for 2, buy JW Black 3 for 2 and buy Smirnoff 3 for 2". The said promotional offer was not informed to Customs Authorities. Therefore, the appellant had violated the provisions of Section 72 of the Customs Act, 1962 and Trade Facility No.50/2005; admittedly, accepting their lapse, the appellant paid an amount of Rs.14,21,751/-. Accordingly, the Original Authority confirmed the demand along with interest and imposed penalty of Rs. 50,000/-. On an appeal, the Commissioner (Appeals) upheld the order of the original authority. Aggrieved by this order, the appellant is in appeal against this impugned order.

2. The learned counsel on behalf of the appellant submits that the promotional offer, in essence, give the customer's discount of 33% on the total value of three bottles of liquor purchased by them. The liquor cleared by the international passengers in excess of the baggage allowance should have been subjected to duty in their hands under Section 28 of the Customs Act 1962 and not demanded from the appellant under Section 72. He further

submits that in terms of Section 71 of the Customs Act, 1962 warehoused goods could be taken out of the warehouse for home consumption or as otherwise provided in the Customs Act, 1962. In terms of Chapter XI of the Customs Act, import of goods as baggage from outside India including the goods purchased from duty-free shops located beyond the customs frontier is a recognised procedure. Under Section 77, the owner has to file a declaration of the contents of the baggage and as per the Baggage Rules, the passenger could carry 2 Litres of liquor as free allowance and if anything, in excess, needs to be declared and pay the duty. Therefore, the duty should have been demanded from the passenger under Section 28 and not from the appellant under Section 72. To substantiate his claim, he has relied upon the decision in the case of Aarish Altaf Tinwala Vs. Commissioner of Customs (Airport) Mumbai in Order No. 634/2018-CUS(WZ)/ASRA/Mumbai dated 31.08.2008. Also relied on the following decisions:

- **Flemingo Travel Retail Ltd. vs. CCGST & CE: 2022 (64) GSTL 564 (T)**
- **Hotel Ashoka vs. ACCT: 2012 (276) ELT 433 (SC)**
- **Sandeep Patil & Flemingo Travel Retail P. Ltd. vs. UOI & Ors.: 2019-TIOL-2348-HC-MUM-GST.**
- **A-1 Cuisines P. Ltd. vs. UOI: 2019 (22) GSTL 326 (Bom.)**
- **Atin Krishna vs. UOI: 2019 (25) GSTL 390 (All.)**

It is also submitted that the adjudicating authority observed that 'the appellant had not done it intentionally to evade customs duty,' therefore, imposition of penalty does not arise as there is no *mens-rea* and no specific provision has been invoked in the present case for imposition of penalty.

3. The learned Authorised Representative has reiterated the findings of the Commissioner (Appeals) and submitted that in the case of **Alpha Future Airport Retail P. Ltd. Vs. CCE New Delhi (Air Cargo Export): 2018 (364) ELT 193 (Tri.-Del.)**, the Tribunal has observed that:

“The appellant has been issued private bonded warehouse license under Section 58. The appellant has also executed the bond under Section 59 *ibid*. The investigation into the affairs of the appellant has categorically showed that the appellant has violated with impunity, the conditions of the issue of PBWL and Public Notice No. 5/2006 which he is required to comply in the operation of DFS. The appellant was permitted to import liquor and other goods without payment of duty and store the same in the private bonded warehouses. They were allowed to sell such goods to international passengers subject to strict conditions as per the Public Notice above. It stands established that goods have been cleared by way of sale in contravention of the conditions imposed on the appellant. The demand for customs duty in respect of such goods cleared in violation of the conditions have been raised in terms of Section 72(1)(a) of the Act which provides for payment of customs duty chargeable on such goods removed in contravention of the conditions of the warehousing bond, along with interest and penalties. The provisions of Section 72 are different from Section 11A of the Central Excise Act. Section 72 pertains to the warehousing goods for which the bond is executed under Section 79 and there is no time limit for the recovery of such dues”.

In view of the above, it is submitted that since they are bound by the bond conditions, they are liable to duty along with interest and therefore, the impugned order needs to be upheld.

4. Heard both sides. Let's examine the relevant sections.

Section 71 of the Customs Act, 1962 which reads as:

Goods not to be taken out of warehouse except as provided by this Act. –

No warehoused goods shall be taken out of a warehouse except on clearance for home consumption or ¹[export], or for removal to another warehouse, or as otherwise provided by this Act.

Section 72 reads as: Goods improperly removed from warehouse, etc. –

(1) In any of the following cases, that is to say, -

(a) where any warehoused goods are removed from a warehouse in contravention of section 71;

(b) where any warehoused goods have not been removed from a warehouse at the expiration of the period during which such goods are permitted under section 61 to remain in a warehouse;

¹ [(c) * * *]

(d) where any goods in respect of which a bond has been executed under ²[section 59 ³***]] and which have not been cleared for home consumption or ⁴[export] are not duly accounted for to the satisfaction of the proper officer, the proper officer may demand, and the owner of such goods shall forthwith pay, the full amount of duty chargeable on account of such goods together with ⁵[interest, fine and penalties] payable in respect of such goods.

(2) If any owner fails to pay any amount demanded under sub-section (1), the proper officer may, without prejudice to any other remedy, cause to be detained and sold, after notice to the owner (any transfer of the goods notwithstanding) such sufficient portion of his goods, if any, in the warehouse, as the said officer may ⁶[deem fit].

4.1 The Trade Facility No.50/2005 issued by the Commissioner of Customs, Bangalore with regard to the sale of goods from Duty-Free Shop reads as follows:

“(V) the imported or indigenous nonduty paid goods permitted to be received and stocked in the Duty-Free Shop shall be sold by the licensee only to the international passengers and on obtaining from them payment in approved foreign currencies. On arrival/ departure side every sale made by duty free shop shall be covered by sale voucher which shall be deemed to be the bill of entry/shipping bill for the purpose of Section 68 or 69 of the Customs Act 1962 in the form prescribed at Annexure G, which inter alia shall show the name of the passenger to whom the sale was affected, the passport number, flight number of aircraft arrival or departure as the case may be. The passenger shall append his full signature on the bill/sale voucher. The sale voucher/bill should be serial number and as far as possible sale voucher books should be used in the duty-free shop in a chronological order. The licensee should intimate the Deputy/Asst Commissioner of Customs airport regarding the sale voucher/cash memo books that are in use from time to time. All such information is should be kept in a separate file and a customs officer in charge of the duty-free shop should ensure that only those cash memo books for each intimations have been received are in use.

It shall be the responsibility of the person in charge of the duty-free shop to inform every incoming passenger who purchases goods from duty free shop that all such purchases will be regarded as import in the country and all the provisions of the Customs act, the Exim policy would be applicable to these goods as they apply to regular accompanied baggage of the passenger.”

4.2 The fact that the appellant is bound by the above Sections and the procedures laid down by the Trade Facility orders is not in dispute. The fact that the warehoused goods are obliged to be removed in accordance with provisions of Section 71 of the Customs Act, 1962 and goods improperly removed from the warehouse are liable to be dealt in terms of Section 72 of the Customs Act, 1962 and they are statutorily obliged to duly account for the goods which are bonded, to the satisfaction of the proper officer, is also not disputed. The Assistant Manager Logistics, Shri Ramesh Poojari of the appellant-company in his

statement dated 3.4.2009 admitted that the promotional scheme launched by them provided for one imported liquor extra for purchase of two bottles as free allowance and he agrees that there has been a failure in complying the statutory requirements in preparation of Annexure-G which did not give details of signature of passengers/customs officers etc. Similarly, Shri Pradeep Lalchandani, Manager Operations in his statement dated 6.4.2009 stated that he admits the omissions and commissions in not getting signatures of the passengers and the officers with regard to various sales transactions. Shri Cherian George, Head of buying and merchandising of the appellant in his statement 16.4.2009 stated that the said promotional offer was not informed to the Customs Authorities at the airport and having realised their mistake in not properly justifying the transactions, necessary payments were made involving sale of liquor sold under discount in excess of duty-free allowances. Even during reply to show-cause notice, it was admitted that liability is accepted in case of 1716 bottles and have paid entire duty at the time of investigation.

4.3 The appellant before us has challenged these orders on the ground that that they are not liable to pay duty under Section 72 but the duty needs to be collected from the passengers and hence, demand against them is liable to be set aside. From the records, we note that the appellants were issued with Customs Bonded Warehouse License and permitted to operate the duty-free shop (DFS) at Bangalore and on investigation into the facts in

terms of the bond executed by them as well as the conditions for grant of permission of running the DFS, which has been made with the strict condition that import of goods such as liquor were allowed duty-free only for the purpose of selling the same to international passengers. They were also required to maintain detailed documentation by which the Customs Authorities could verify and ascertain whether the strict conditions prescribed have been complied. The statements from the various persons in-charge of the duty-free shop and the scrutiny of the documents relating to DFS have revealed that the appellant have completely violated the conditions under which licenses were granted to them.

4.4 Therefore, from the above Sections, it is very clear that the licensee of the Duty-Free Shop is liable to pay duty, if the provisions of Sections and the Procedures laid down therein, are violated and therefore, the question of passengers paying duty does not arise. This has also been affirmed by the Tribunal in the case of **Alpha Future Airport Retail P. Ltd.** (supra) which has been upheld by the Supreme Court as reported at **2021 (378) ELT 4 (SC)**. The Tribunal as discussed supra has clearly held that the provisions of Section 72 are applicable to the appellant and they are liable for duty along with interest. In view of the above, the duty along with interest is upheld. With regard to penalty as rightly observed by the Original Authority, there is no intention to evade payment of duty and the fact that the officers are also to verify the vouchers and countersign the sale vouchers, the fact of

awareness by the officers cannot be ignored and hence, we set aside the penalty.

5. In view of the above, the duty demanded along with interest is upheld and the penalty is set aside.

(Order pronounced in open court on 10.01.2024.)

(P. A. AUGUSTIAN)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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