

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. III

Customs Appeal No. 42066 of 2013

(Arising out of Order-in-Original No.21481/2013 dated 01.08.2013 passed by Commissioner of Customs
60, Rajaji Salai, Custom House, Chennai-600 001)

M/s. Flemingo DFS Pvt. Ltd.,

Old No. 16A, New No.35, First Floor,
K.V. Apartments, Poes Garden,
Chennai-600086
Rep. by its General Manager R. Murali

...Appellant

Versus

The Commissioner of Customs, (Import),

60, Rajaji Salai, Customs House,
Chennai 600 001.

...Respondent

APPEARANCE:

For the Appellant : Mr. C. Manishankar, Senior Counsel

Mr. S. Arun Prasad, Advocate

For the Respondent : Mr. Harendra Singh Pal, AC (A.R.)

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 17.07.2023

DATE OF DECISION : 31.07.2023

FINAL ORDER No. 40621/2023

Order : Per Ms. Sulekha Beevi C.S.

Brief facts are that, the appellant, viz M/s Flemingo DFS Pvt Ltd, which runs a chain of Duty Free Shops, was issued a Private Bonded Warehouse license dated 16.02.2005. The said warehouse is situated within the premises of Chennai Sea Port. The license was periodically renewed by the appellant. They were also permitted to operate Duty Free Shop adjacent to the licensed Private Bonded

warehouse which is also inside the Sea Port premises. This duty free shop is engaged in sale of goods like liquor and cigarettes. The appellant had requested for renewal of license.

1.1 It was noted that in the year 2006, the appellant had been involved in clandestine removal of goods by forging documents, making false declarations and causing loss of revenue to the tune of 3.88 crores for which Show Cause Notice dated 10.01.2007 was issued by department. The appellant then approached the Settlement Commission and settled the matter by payment of duty of Rs. 82,25,502.45 and was granted immunity from prosecutions. Though department filed appeal against such order before the Hon'ble High Court, the same was dismissed by the Single Judge. The department filed writ appeal against such order (which was later dismissed vide order dated 03.07.2019)

1.2 In the course of issuing the above Show Cause Notice, the license issued to the appellant was suspended vide memo dated 03.10.2006 under Section 58(3) of Customs Act, 1962. The appellant filed writ petition before the Hon'ble High Court and interim stay was granted which allowed the appellant to continue the business. In compliance of such order the license was renewed from time to time.

1.3 In respect of the appellant's duty Free Shop at Goa International Airport, the appellant was issued another Show Cause Notice demanding duty of Rs. 96,66,209 for the shortfall in warehoused goods.

1.4 Again, in April 2011, in the bonded warehouse at Chennai, goods (involving duty of Rs. 3,17,101) were stolen in an act of burglary. The appellant was asked to shift their warehouse to more safe and secure place inside the port premises.

1.5 The appellant was involved in forging and falsification of records to evade customs duty in the Vishakhapatnam port and Show Cause Notice was issued. The notice was adjudicated and duty was confirmed vide order 07/2011 dated 30.11.2011. The Private Bonded Warehouse license was cancelled. This order was stayed by CESTAT, Bangalore vide order dated 06.08.2012.

1.6 The license of the appellant impugned in this case was extended periodically on the basis of Hon'ble High Court order till 07.07.2011. The appellant then vide

letters dated 24.11.2011 and 08.02.2012 requested for extension/renewal of license.

1.7 The present Show Cause Notice dated 07.11.2011 was issued to the appellant to show cause as to why the request for renewal of license should not be rejected and also as to why their License (No. P-840 and DFS) should not be cancelled.

1.8 After due process of law, the Commissioner of Customs vide order impugned herein denied the request for renewal and also ordered for cancellation of the licence. Hence the appellant is now before the Tribunal.

2. The Learned Senior Counsel Shri. C. Manishankar assisted by Shri. S. Arun Prasad appeared and argued for the appellant. It is argued by the Learned Counsel that all the instances of violation of law alleged in the Show Cause Notice has been now decided in favour of appellant and therefore the rejection of the request for renewal of license and consequent cancellation of license is without any basis.

3. It is submitted that in regard to the duty demand of Rs. 3.88 crores alleging clandestine removal of goods from the duty Free Shop (DFS) at Chennai Port premises, the appellant had approached the Settlement Commission and the matter was settled. As per the order of Settlement Commission, Chennai passed on 04.06.2007 the duty liability was settled for Rs. 82,25,502.45/- As per the said order, the appellant is granted immunity from fine, penalty and prosecution under the Customs Act and under any other Central Acts.

3.1. The basis for the above allegation of clandestine removal of goods by forging documents and false declarations was that the signature did not tally with the signature of the crew in the declaration with Department, there was no signature of crew member in cash bill, the name of crew/vessel was not seen mentioned in the cash bill, no such crew was available during voyage, sale was made to costal run vessel, signature did not tally purchase denied by master etc. The department was not able to prove the diversion or clandestine removal of goods. The maximum evasion of duty alleged was on the basis that signature of buyers did not tally with

the signature available with the department. The comparison of signature was on visual examination and the department did not produce any expert opinion in this regard. The appellant then moved the Settlement Commission after admitting duty liability of Rs. 82,25,502.45 for which the appellant was not able to produce any evidence due to the long time lapse.

3.1.1. The Settlement Commission ordered for payment of the above amount with simple interest of 10% p.a. Further, immunity was granted to appellant and co-applicants. The department then filed writ petition before the Hon'ble High Court challenging this order of the Settlement Commission which was after a huge delay of one year. The Hon'ble High Court vide order dated. 19.12.2009 held that the order passed by Settlement Commission is valid and does not suffer from any infirmity. The department then preferred writ Appeal No. 2036/2010 against such order. The writ appeal was dismissed vide order dated 03.07.2019, as being devoid of merits.

3.2. Meanwhile, the department suspended the Private Bonded Warehouse license (P-840) issued to the appellant by issuing a memorandum dated 03.10.2006 by invoking Section 58(3) of Customs Act, 1962. This memorandum was challenged by the appellant before Hon'ble High Court by way of W.P. No. 1156/2007. The Hon'ble Court granted interim stay and also directed the department to permit the appellant to continue their business.

3.3. In April 2011, goods involving duty amount of Rs. 3,17,701 was stolen from the appellant's warehouse in Chennai Sea Port premises. The appellant lodged police complaint, and later a 'not traceable certificate' was issued by the Police. There was no involvement of the appellant staff. The department directed the appellant to shift the shop to safe and secure area. Accordingly the appellant shifted to new space at First floor of passenger Terminal Building. The appellant has thus complied with department direction.

3.4. Another allegation in the Show Cause Notice is that there was shortfall in the warehoused goods in regard to DFS, at Goa International Airport. Separate Show Cause Notice was issued demanding Rs. 96,66,209/- against the appellant. After

adjudication, the demand was confirmed. The appellant preferred an appeal before *CESTAT, Mumbai and vide F.O. No. A/85700/2018 dated 22.03.2018 as reported in 2018 (361) E.L.T. 742(Tri-Bom)* the demand was set aside. It was held by the Tribunal that theft incident has not occurred due to any improper removal of the goods by the appellant and hence no duty could be recovered from the appellant.

3.5. Another incident alleged in the Show Cause Notice is that appellant was involved in evasion of Customs duty by forging and falsification of records in their DFS at Vishakhapatnam Port. Show Cause Notice dated 21.07.2008 was first issued for seizure of goods worth Rs. 26,931/- which was found outside the bonded lockers of the vessel. Subsequently another Show Cause Notice dated 19.01.2009 was issued proposing to demand Rs. 2,09,45,632 towards Customs duty for the period 10/2005 to 20.07.2008. After due process of law the original authority vide Order-In-Original dated 30.09.2010 confirmed demand of Rs. 1,78,53,938/- and imposed penalty. Against this, the appellant as well as department filed appeals before the CESTAT. The Tribunal vide Final order dated 18.04.2011 set aside the order-in-original dated 30.09.2010 and remanded the matter for denovo-adjudication. In such denovo proceeding the original authority vide Order-in-Original dated 30.11.2011 confirmed the proposals in both the Show Cause Notice.

3.5.1 Aggrieved by such order, the appellant filed appeal before the *Tribunal and vide Final Order No. A/31754-31756/2017 dated 06.11.2017 as reported in 2018(363) E.L.T. 450(Tri-Hyd)* allowed the appeal, by setting aside the duty demand confirmed against appellant. The Tribunal also ordered to restore the license of the appellant within a period of one month.

3.6. It is submitted that all the incidents alleged in the present Show Cause Notice have reached finality and have been decided in favour of appellant. Therefore there are no grounds to reject the request for renewal of license. The Learned Counsel prayed that the appeal may be allowed.

4. The Learned Authorized Representative Shri Harendra Singh Pal appeared and argued for the appellant. It is submitted that the appellant has admitted duty

liability before the Settlement Commission which would prove that the appellant has evaded Customs duty. The allegations raised in regard to Goa and Vishakhapatnam are serious offences. In both incidents the original authority has upheld the demands on the ground that appellant has violated the Regulation and evaded Customs duty. Merely because the appellant succeeded in appeal it cannot be concluded that the appellant has not indulged in such forging and falsification of documents. It was not a single stray act of evasion of Customs duty. The appellant is not entitled to get the license renewed. The Learned Authorized Representative prayed that the appeal may be dismissed.

5. Heard both sides.

6. The issue to be decided is whether the order passed by the Commissioner denying the request for renewal of licence and ordering cancellation of the Private Bonded Ware House License bearing No. P-840 & DFS of the appellant is sustainable or not.

6.1. The allegations raised in the Show Cause Notice issued by department proposing to deny the renewal of license and proposing to cancel the same has already been narrated in earlier paragraphs. The Learned Counsel for appellant has asserted that all such incidents have been decided in favour of the appellant. The first incident narrated in the Show Cause Notice is with regard to the duty demand of Rs.3.88 crore alleging clandestine removal of goods from their premises at Chennai Sea Port. The appellant approached the Settlement Commission and admitted duty liability of Rs. 82, 25,502.45/-. The amount so settled was paid with interest. As per the order, the appellant is granted immunity from fine, penalty and prosecution under the Customs Act and any other Central Act. The operative portion of the order of the Settlement Commission dated 04.06.2007 reads as under:-

“16. Accordingly, the case is settled on the following terms and conditions, in terms of sub-section (7) of Section 127 (C) of the Customs Act, 1962:

(i) The duty liability is settled at Rs. 82,25,502.45/-. Since the applicant has paid this amount in full, no further duty liability subsists;

(ii) The applicant shall pay simple interest of 10% p.a. on the admitted duty liability for the period when the duty became due till the date of actual payment of duty. The Revenue shall work out the Interest liability and adjust the same from the amount already deposited by them. After adjusting the duty and interest, balance amount, if any, shall be refunded to the applicant

(iii) Immunity is granted to the applicant from fine, penalty and prosecution under the Customs Act and under any other Central Acts;

(iv) The co-applicants are also granted immunity from penalty and prosecution under the Customs Act and any other Central Acts.”

6.2. Though the department filed appeal against this order before the Hon'ble High Court, the same has been dismissed. Learned Authorized Representative has argued that the appellant has admitted the liability before the Settlement Commission in order to settle the dispute and therefore the guilt on the part of the appellant is established. In our view, the said argument is untenable. The Settlement Commission provides for an alternate dispute resolution mechanism for taxpayers who wish to resolve the tax disputes in a spirit of conciliation rather than litigation. It is a remedy (under Section 127A) provided under the Customs Act itself. It also expedites the payment of duty by not getting entangled in litigation. The Settlement Commission has power to grant immunity from prosecution and penalty. The immunity so granted can be withdrawn only by provisions of law. There is nothing to show that the immunity granted has been withdrawn by the Commission. The admission of duty liability before the Settlement Commission is for the purpose of settling the dispute. An applicant before the Commission cannot be put to an adverse situation in any other proceeding after the grant of immunity. Further, in the present case, the proceedings have been initiated (Show Cause Notice issued) invoking Section 58(3) of Customs Act, 1962. The immunity granted against prosecution under the Customs Act, 1962 will include, the above proceedings initiated under Section 58(3) also which has culminated in the order revoking the license issued to the appellant. Therefore the settlement of the dispute cannot be a ground for not renewing/revoking the license.

6.3. The second incident is the shortage of goods at DFS of International airport, Goa. This matter after adjudication reached the Tribunal and the demand has been set aside. The relevant para of the order passed by Tribunal in the case of *Flemingo Duty Free Shop Pvt Ltd vs CCE & ST Goa reported in 2018(361)E.L.T. 742 (Tri-Mumbai)* reads as under:-

“6. We find that Section 23 of the Customs Act, which provides for remission of duty on imported goods, reads as follows :

“Remission of duty on lost, destroyed or abandoned goods. -

(1) Without prejudice to the provisions of Section 13, where it is shown to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs that any imported goods have been lost (otherwise than as a result of pilferage) or destroyed, at any time before clearance for home consumption, the Assistant Commissioner of Customs or Deputy Commissioner of Customs shall remit the duty on such goods.

(2) The owner of any imported goods may, at any time before an order for clearance of goods for home consumption under Section 47 or an order for permitting the deposit of goods in a warehouse under Section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon :

Provided that the owner of any such imported goods shall not be allowed to relinquish his title to such goods regarding which an offence appears to have been committed under this Act or any other law for the time being in force. ”

Sections 58 of the Customs Act, 1962 read as follows :

“58. Licensing of private warehouses. - (1) At any warehousing station, the Assistant Commissioner of Customs or Deputy Commissioner of Customs may license private warehouses wherein dutiable goods imported by or on behalf of the licensee, or any other imported goods in respect of which facilities for deposit in a public warehouse are not available, may be deposited.

(2) The Assistant Commissioner of Customs or Deputy Commissioner of Customs may cancel a licence granted under sub-section (1) -

(a) By giving one month’s notice in writing to the licensee; or

(b) If the licensee has contravened any provision of this Act or the rules or regulations or committed breach of any of the conditions of the licence :

Provided that before any licence is cancelled under clause (b), the licensee shall be given a reasonable opportunity of being heard.

(3) Pending an enquiry whether a licence granted under sub-section (1) should be cancelled under clause (b) of sub-section (2),

the Assistant Commissioner of Customs or Deputy Commissioner of Customs may suspend the licence.

A plain reading of the above would reveal that Section 58 stipulate that they are subject to the conditions prescribed in the licence and also subject to execution of warehousing bond under Section 59. One of the conditions of the licence and warehousing bond executed by the appellant is that the appellant shall insure the goods deposited in the warehouse against theft, pilferage, fire accident and other natural calamities, etc., at least for a value equal to the Customs duty by a warehousing insurance policy drawn in favour of the Commissioner of Customs. In the present case it is an admitted position that the appellant insured the warehoused goods for that part of the value representing Customs duty on the imported goods. Thus it is clear abidance of the terms and conditions of the warehousing licence issued under Section 58 of the Customs Act and the warehousing bond executed under Section 59. Having followed the terms and conditions of the licence, the appellant is thus entitled to claim the benefit under Section 23 of the Customs Act by remission of duty. Section 23 is a general provision whereas Section 58 is specific provisions relating to warehousing. The conditions stipulated under the specific provisions have to be complied with *in toto* and the said provisions shall prevail over the general provisions prescribed under Section 23. It is a settled position in law that specific provisions shall prevail over the general provisions. The Tribunal Larger Bench in case of *M/s. Avis Electronics Pvt. Ltd.*, [2000 \(117\) E.L.T. 571](#) (Tri.-LB) held that when a particular thing is directed to be performed in a manner, statutorily, it should be performed in that manner itself and not otherwise. Similar views were expressed by the Hon'ble High Court of Gauhati in case of *CCE v. Jellalpure Tea Estate*, [2011 \(268\) E.L.T. 14](#) (Gau.) wherein the Hon'ble Court held that "what is required to be done in a manner prescribed by law, ought to be done in that manner only or not at all." In such a case as the appellant has insured the goods for the Customs duty involved on the goods deposited in the warehouse in favour of the Commissioner of Customs, they are entitled for the benefit under Section 23 of the Customs Act. Therefore, demand of Customs duty on the warehoused goods which has been stolen cannot be demanded from the appellant. The judgment cited by the revenue and relied upon by the adjudicating authority stands on different footing as those judgments are not in relation to warehoused goods of which duty was insured by way of insurance policy drawn in favour of Commissioner of Customs in terms of Bond Licence. Thus the judgments relied upon by the revenue are not applicable to the present case. Further in none of cases cited by the revenue the fact of insurance of duty of warehoused goods in favour of Commissioner of Customs is emanating which shows that as far as the duty is involved the insurance company was liable to make the duty payment to the revenue.

7. We are also of the view that when there is scope for interpretation of any law, to achieve the right intendment of law it is necessary to analysis the objective of the law under interpretation with represent to the subject matter of the present case, the object of remission of duty is either in Excise or Customs that when goods is lost, even though the same is otherwise liable to duty either on imported goods or manufactured goods but since the

goods is not capable of being enjoyed by the owner either for his consumption or for sale and he loses the value which is much more than the duty, the owner of the goods should not be further burdened with duty. In the present case also, the appellant lost the entire value of the goods due to admitted theft. Therefore in such case duty cannot be demanded.

8. Further we find that in case of *Sushil Kumar Kayan v. Assistant Collector of Customs*, [1993 \(68\) E.L.T. 537](#) (Cal.), the Hon'ble High Court held that no duty is payable on goods stolen from the bonded warehouse. Even in that case the facts do not show as to whether the duty of stolen goods was insured in favour of the Customs Department whereas in the present case the duty is adequately secured by way of insurance policy in favour of revenue.

9. In view of above discussion and facts we are therefore of the view that there is no ground to demand duty from the appellant and the demand is required to be set aside. We therefore set aside the impugned order and allow the appeal with consequential reliefs, if any."

6.4. The third incident, is the evasion of duty alleged at DFS, Vishakhapatnam. The same also reached Tribunal and vide order dated 06.11.2017 in the case of *Flemingo (DFS) Pvt Ltd vs CC Vishakhapatnam 2018 (363) E.L.T. 450 (Tri-Hyd)* the demand been set aside exonerating the appellant. The relevant para reads as under:-

"18. In the result we find that the revenue has failed to discharge the requisite burden to saddle the Appellants with liability to confiscation and penalty. Import Duty is payable only when goods are imported into the customs barriers of India. There is no tangible evidence that goods have been improperly imported into the customs barriers of India. No tangible evidence is produced to show that the goods were removed for home consumption and crossed the customs barriers of India. There is also no tangible evidence produced to show that the goods were sold in domestic market. Further there is no liability to pay duty on goods which were sold at DFS after being cleared by the Customs and exported thereafter. Hence, on these facts the demand of duty is even otherwise erroneous.

19. Based on above unsubstantiated allegations, which are not sustainable even on the test of preponderance of probability, the adjudicating authority issued an order cancelling the license. Therefore, this harsh action is also set aside.

20. In the result, the Appeal filed by the Revenue against the earlier Order-in-Original dated 30-9-2010 is dismissed as infructuous. All three appeals of the Appellant Company and its representatives against the *de novo* Order-in-Original dated 30-11-2011 are allowed with consequential reliefs.

21. The license of the Appellant Company shall be restored within a period of one month from the date of receipt of this Order.”

7. From the facts placed before us, the allegations raised in the Show Cause Notice are no longer live or exist. In such circumstances from the discussions made above, the department cannot deny the request for renewing the license. So also the order for cancellation of the license cannot survive.

8. In the result, the impugned order is set aside. The appeal is allowed with consequential reliefs, if any.

(Order pronounced in open court on 31.07.2023)

(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

RKP