CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing: 17.05.2017
Date of pronouncement: 12.09.2017

Appeal No. C/4004/2012, C/59403/2013-CU[DB]

[Arising out of the Order-in-Original No. RT-ACE-203&204-2012 dated 21/08/2012 and RT-ACE-25-2013 dated 17/05/2013, passed by the Commissioner of Central Excise, New Delhi]

M/s. Alpha Future Airport Retail Private Ltd. … Appellant

Vs.

C.C.E. New Delhi (Air Cargo Export) ... Respondent

Appearance:

Present Shri S. Ganesh & Shri Anand Sukumar, Advocate for the appellant
Present Shri Yogesh Agarwal, DR for the respondent

Coram: **Hon'ble Mr. S.K. Mohanty, Judicial Member**
Hon'ble Mr. V. Padmanabhan, Technical Member

FINAL ORDER No. 56537-56538/2017

Per V. Padmanabhan:

There are the following two appeals of the appellant before the Tribunal:

a) Appeal No. C/4004/2012-Cus against the OIO no. 203 & 204/2012 dated 21/08/2012 based on the two show cause notices dated 01.04.2009 and 02.07.2010 both relating to the period 27.03.2007 to 08.10.2008.

b) Appeal no. C/59403/2013-Cus against the OIO 25-2013 dated 17.05.2013 based on the Show cause notice dated 26.03.2012 also relating to the very same period 27.03.2007 to 08.10.2008.

2. Both the appeals are being decided through this common order. M/s. Alpha Future Airport Retail Private Ltd. (M/s. Alpha), the appellant, have been permitted to operate Duty Free Shops (DFS) at IGI airport (Terminal 2) New Delhi in arrival as well as departure areas since March 2007. For this purpose they obtained a Private Bonded Warehouse License (PBWL) and agreed to abide by various conditions associated with the same. As per the licenses issued, M/s. Alpha were permitted to import goods such as liquor, chocolates, cigarettes, etc. duty free, to be sold only to International passengers arriving or departing from / to foreign destinations. They were required to collect the sale proceeds in foreign exchange and were also required to maintain various records as prescribed. In particular, every sale was required to be recorded and details of passenger name, passport number, flight number and other relevant details were required to be recorded and sale vouchers to be issued. The procedure required to be followed for operation of DFS were prescribed by customs vide public notice no. 5/2006. Show cause notices dated 01.04.2009, 02.07.2010 as well as 26.03.2012 have been issued to M/s. Alpha, alleging that they have made sales of liquor from the stock of duty free imports

in contravention of various conditions which are required to be adhered to by M/s. Alpha as a duty free shop. A small portion of the demand also relates to certain shortages found by customs authorities during stock taking. The allegations in show cause notice dated 01.04.2009 and 02.07.2010 came to be decided vide order in original dated 21.08.2012 as follows:

i) Seized goods were ordered for confiscation and allowed to be redeemed on payment of redemption fine of Rs. 2 lakhs. Customs duty of Rs. 1,36,093/-, Rs. 11,58,653/- and Rs.1,34,918/- on seized goods / shortages were also demanded.

ii) Penalties were also imposed on M/s. Alpha under various sections of Customs Act.

3. Show cause notice dated 02.07.2010:

i) Customs duty amounting to Rs.6,30,38,783/- demanded under section 72 of Customs Act 1962 along with interest.

ii) Penalties under various sections of Customs Act on M/s. Alpha.

4. The allegations in show cause notice dated 26.03.2012 came to be decided vide order in original dated 17.05.2013 as follows:

i) Demand of customs duty amounting to Rs.23,84,30,219/- along with interest.

ii) Penalties imposed on M/s. Alpha under various sections of Customs Act.

iii) Penalties imposed on various employees of M/s. Alpha.

5. With the above background, we have heard Shri S. Ganesh, Sr. Advocate & Shri Anand Sukumar, Advocates for the appellant and Shri Yogesh Agarwal, DR for the respondent.

6. The main grounds advanced on behalf of the appellants are:

i) The IGI airport was undergoing a major renovation at the relevant time, as a result of which there were numerous changes in the locations of appellant's DFS. As a consequence, serious problems were experienced in the working of software used for recording sales and also in the CCTV recording system. These factors prevented the management of the appellant from detecting various malpractices engaged in by the some of their rogue employees during the relevant period.

ii) Even though the appellant had given proper training to its employees and had given them strict instructions regarding the procedure of sales, several irregularities were noticed against employees who had violated the prescribed conditions in the sale of liquor. However, a total of 66 employees were terminated and appellant company were not aware of the illegal sales being made clandestinely by the rogue employees for their personal benefit.

iii) All the three show cause notices dated 01.04.2009, 02.07.2010 and 26.03.2012 are related to the very same period – 27.03.2007 to 08.10.2008. It is well settled legal position that more than one show cause notices cannot be issued for the same period. Consequently, the orders in original confirming the demand of customs duty and penalties based on the second and third show cause notices are required to be set aside in toto. In this regard, they relied on the following decisions:

a) CCE Vs. Siddharth Tubes ltd. 2004 (170) ELT 331

b) Shreeji Colourchem Industries Vs. CCE 2013 (294) ELT 615

c) Paro Food Products vs. CCE 2005 (184) ELT 50

iv) It has been held by the Hon'ble Supreme Court in the case of ***Hotel Ashoka Vs. AICT 2012 (276) ELT 433 (SC)*** that a DFS is located beyond the customs frontier of India and, therefore, goods sold by a DFS must be considered to have been sold before the goods cross the Customs frontiers of India and are thereby imported to India. Accordingly, it was submitted that no duty demand can be made against M/s. Alpha who was a DFS but it has to be effected on the passenger who is the importer and hence liable to pay customs duty.

v) It is well settled legal position that where customs violation have been committed by employees without the knowledge of the employer, then all demands for duty and penalty are to be raised against the delinquent employee and not the employer.

vi) The valuation of goods in question for the purpose of quantifying the demand for customs duty is erroneous since the same profit margin has been applied for every product line. Erroneous rates of duty have been applied in many cases. Further, in cases where special offers were being made by the DFS, the benefit of the same has not been extended.

vii) The duty free shops cannot be treated as a bonded warehouse for the purpose of Customs Act and hence even if DFS was operated in an irregular manner, it can only be considered as violation of bonded warehouse licenses and no customs duty can be demanded.

7. The Ld. DR justified the impugned orders. He argued that M/s. Alpha have agreed to the conditions under which they were allowed to operate the duty free shops. Imported goods such as liquor have been found to have been sold from DFS in contravention of the conditions imposed by Customs. Consequently, such goods are to be considered as cleared from the bonded warehouse in contravention of the conditions

in which goods were allowed to be stored in the bonded warehouse. Consequently, customs duty is liable to be paid by M/s. Alpha in the terms of section 72 (1)(a) of the Customs Act. The appellant will also be liable for penalty for violation of various conditions. The employees of M/s. Alpha, vide their statements have admitted to the fraud committed by them by selling duty free goods to domestic passengers in contravention of the terms of the relevant customs public notice. Consequently, penalty imposed on the employees is also fully justified. He submitted that the impugned orders may be upheld in toto.

8. We have heard both the sides at length and perused the appeal papers.

9. For proper appreciation of the case, it is necessary to recount the facts of the case. M/s. Alpha obtained private bonded warehouse license (PBWL) which permitted them to import and store goods for the purpose of further sale to arriving / outgoing and in transit international passengers. They were also allowed to run duty free shops at various locations at the IGI airport New Delhi in arrival as well as departure areas since March 2007. As per the conditions of PBWL, M/s. Alpha was required to adhere to 15 conditions including in the public notice number 5/2006 dated 27.02.2006 issued by the Commissioner (Customs) which govern the procedure for the operation of duty free shops at the IGI airport. The public notice inter alia prescribed that M/s.

Alpha will maintain stock register for the goods imported duty free, and their further disposal in particular.

10. The imported or indigenous non-duty paid goods permitted to be received and stocked in the DFS shall be sold by the License only to International passengers and on obtaining from them payment in approved foreign currency or Indian currency as per the notification issued by CBEC from time to time. Every sale shall be covered by a sale voucher (which shall be deemed to be a shipping bill or bill of entry under section 69 or 68 as the case may be) which, inter-alia, shall show, the name of the passenger to whom the sales are effected, the passport number identity of passenger, the no. and date, description of goods and flight details. The passenger shall append his signature on the bill as per his signature in the passport. The sale voucher should be serially numbered and prepared in duplicate, the original for the passenger and the duplicate for the duty free shop. The latter copy should be available for inspection by the Customs officer at all reasonable times.

11. On 08.10.2008 the Assistant Manager of Indian Airlines informed customs authorities that three passengers were offloaded from domestic flight IC 883 for carrying huge amount of liquor in their hand baggage. Upon investigation by the customs authorities it emerged that 51 bottles of liquor of “J W Black Label” whisky were cleared from the DFS in departure in violation of legal provisions governing such sale.

The domestic passenger who had purchased the 51 bottles of liquor had made payment of the same in cash US$ 500 and balance of US$ 600 by credit card. The statement of the passenger Shri Mukesh Wahi as well as that of the cashier and manager of M/s Alpha and that of Shri Suresh Chandra Singh, supervisor were recorded by customs in which they had admitted selling the liquor to the domestic passengers. Customs authorities seized the 51 bottles of liquor which was subsequently followed by issue of show cause notice dated 01.04.2009 and cconfiscation in OIO dated 21.08.2012.

12. The above material facts indicated violation of customs regulations governing DFS and paved way for the further detailed investigation of DFS governed by M/s. Alpha.

13. Investigating Agency proceeded on 09.10.2008 to physically verify the goods stored by appellant at different places. Such verification continued upto 14.10.2008 and inventory was recorded in Panchnama of each day of verification. That resulted in huge stock discrepancy.

14. Scrutiny of records revealed that appellant issued bills without mentioning requisite details like particulars of buyer passenger, his name, passport number and nationality, his flight number and seat number etc., therein. A sample study of bills issued by appellant during 01.10.2008 to 08.10.2008 as tabulated in para 19.3 of adjudication order revealed deficiency of above nature ranging from 94 bills to 592 bills

issued on different days of that period. Similarly table under para 19.4 of the adjudication order at page 20-21 thereof also reveal the deficiency of above nature for the sales during August 2008 to October 2008. According to customs, such act of the appellant resulted in violation of terms of Private Banded warehouse license and mandate of Public Notice No. 05/2006 dated 27.02.2006 as well as office order No. 254/2001 dated 19.11.2001 was violated. The discussons in above paragraphs showed that the goods covered thereby were not sold to international passengers and evasion of customs duty was made making false entries on record.

15. Further scrutiny of sales bills of the duty free shop operated by appellant in departure area of IGI Airport revealed that a large number of sales bills were issued in the name of and Mr. Manish who was an Indian National. Passport No. A-1425369 was mentioned against sales made to such person which was found to be fake and with change of one or more digits of that number, other fake numbers appeared in several bills. It was also found that the bills issued in the name of Mr. Manish stating the passport number as above, appeared against other names as detailed in RUD-No.-25. That proved unrealistic situation and making of fake sales entries on record. Such material fact came to record proving falsification and commitment of fraud against Revenue.

16. Enquiry further revealed that sale of goods of Rs. US $ 1790 made on 01.09.2008 issuing 47 sale bills exhibited name

of Shri Manish mentioning departure from Airport different flights No. VS-301, JO-472, AI-310, AI-III and EK-511 as per particulars detailed by learned Adjudicating Authority in Para 20 to page 23 of the Adjudication order.

17. On 04.09.2008, the appellant recorded that sales were made to one Shri Manish through 60 sale bills said to have travelled by flights AI-306, KL 872, AI-III, TG-316, BA-142, BA-265 and SU-536. The aggregate sale made to that passenger was US $ 3715. The passport number A1425369 which was shown against the names of Mr. Manish was also used against the names Pradeep, Jatin, Kawaljit and Tarun etc. Similarly the passport No. A1425369 used against the name of Mr. Manish on 07.09.2008 was also used against the name Mr. Goyal, Mr. Amnish and Nancy and sales bills exhibited departure by flight No. 9W-272, VS-301, AI-III and JO-472. Further, sale bill of 16.09.2008 and 20.09.2008 disclosed the same name Mr. Manish against 90 and 39 sales bills respectively and the passport number appeared against Mr. Manish also appeared against the names Mr. Amnishqh, Mr. Saurabh, Mr. Anil, Mr. Rahul and Mr. R.K. Chug and Mr. Manish was shown to have boarded flight Nos. SQ-407, CX-752, AI, 1211, AI-1215, AI-III and SU-536 on 16.09.2008 and flight Nos. KL-872, BA-142, AI-111 and AI-115 on 20.09.2008. Strangely some of the bills of 21.06.2008, 07.07.2008, 11.07.2008 and 29.07.2008 examined showed sale of abnormal quantity of sale of 117 bottles of liquor of Rs.

US $ 2652, 165 bottles of liquor for US $ 3740, 189 bottles of liquor for US$ 4708 and 180 bottles of liquor for US$ 4080. Similar was the situation in respect of sale on 18.08.2008, 05.09.2008 and 06.10.2008. Such falsification of record was proved from the statement of Shri Manvendra Singh, cashier who was acting under the directions of Management Trainee/Assistant Deputy Manager Shri Varun Aggarwal and Shri Hemant Bharadwaj.

18. Enquiry was made from Regional Passport officer New Delhi to ascertain genuineness of passport No. A-1425361, A 1425369, A 14253699 and A 1425326 and A 14215369. That Authority informed that no such passport numbers existed in the official record of passport office in the name of Mr. Manish.

19. As part of further investigation custom authorities recorded statement of Shri Manvendra Singh, cashier, M/s. Alpha, Shri Rahul Sachdeva, Shri Puneet Bansal, Shri Suhail Nabi, Shri B.K. Pradhan & Ms. Fauzia Bakshi. All the above employees of M/s. Alpha admitted to the fact that M/s. Alpha were violating the conditions of PBWL by selling the goods regularly to domestic passengers and other persons who were not international passengers at the relevant time. Further, it emerged that M/s. Alpha were issuing fake sale bills without details or with false passenger details from the DFS and thereby concealed and suppressed the facts that imported duty free liquor were being unlawfully removed from PBWL in the guise of sale to international passengers. The customs

authorities further obtained various details such as bills of entry under which liquor was imported for the PBWL and other details and worked out the value of imported liquor diverted clandestinely. The above investigation resulted in issue of show cause notice dated 02.07.2010 in which customs duty amounting to Rs. 6,30,38,783/- was demanded along with proposals to impose penalty under various section of the customs act.

20. Further, investigations were conducted to ascertain the authenticity of the bills generated by M/s. Alpha at the DFS for the period March 2007 to October 2008, other than those covered under the SCN dated 02.07.2008. The details of the passengers whose names appeared on the bills and purported to have travelled by various flights as indicated in the various bills were taken up for verification with the concerned airlines as well as from FRRO New Delhi. Based on the information received the bills issued in the names of the passengers who had not travelled were identified through an elaborate exercise. As part of further investigations various employees of M/s. Alpha who were involved in issuing such bills were interrogated and their statements recorded.

21. Examination of different officers of different Airlines tabulated in para 29 at pages 40-43 of adjudication order revealed that no travels were made by passengers named in the number of entries appearing in the sales record of the appellant. Similarly, enquiry revealed that large number of

sale entries made in sale record as tabulated under para 29 of adjudication order of page 44 mentioning the Airlines, were found to be closed. Those entries were false. Para30 of the adjudication also demonstrates similar situation. Entire enquiry revealed falsity of record and evasion of custom duty made by the appellant.

22. A very important fact that was also discovered by investigation was that the false transaction of aforesaid nature were corroborated by falsification of record and receipt of sale proceeds in US$ from undisclosed sources and such currency deposited with M/s Thomas Cook which prima facie appears to be hawala transaction and needs further investigation by Central Economic Intelligence Bureau. Ld. JCDR is directed to do the needful in this regard.

23. The investigations concluded that M/s. Alpha had made sales to the value of Rs.14,98,72,273/- in breach of the conditions of the bond executed for the PBWL under section 59 of the Customs Act 1962. Accordingly, show cause notice dated 26.03.2012 was issued demanding customs duty amounting to Rs. 23,97,85,638/- for making sales of imported goods, in violation of the terms of the PBWL.

24. The proposals made in the show cause notices dated 01.04.2009 and 02.07.2010 came to be confirmed in the OIO dated 21.12.2012 and those of SCN dated 26.03.2012 was

confirmed by OIO dated 17.05.2013. Both the appeals against these two OIO's are being decided through this order.

25. The initial show cause notice dated 01.04.2009 covered the seizure of 51 bottles of liquor which were found to have been sold by the appellant to domestic passengers. The SCN also covered the shortage noticed in the stock of liquor at the DFS. It stands admitted by the various employees of M/s. Alpha that 51 bottles of liquor have been sold to domestic passengers in violation of the customs notification and these goods are liable for confiscation. Further, no plausible explanation has been offered regarding shortage of goods found other than a feeble statement that IGI airport was undergoing major renovation and that the location of the appellants DFS was repeatedly changed. Evidence gathered clearly suggested the goods found short have been removed from the customs bonded warehouses in contravention of section 71 of the Customs Act. Accordingly, we have no hesitation in upholding the confiscation and demand the duty made pertaining to SCN dated 01.04.2009.

26. The demands confirmed by the Adjudicating authority pertaining to show cause notices dated 02.07.2010 and 26.03.2012 have been challenged by the appellant mainly with the argument that all the three notices are related to the very same period i.e. 27.03.2007 to 08.10.2008. It has been argued that more than one show cause notice for the same period cannot be issued. Show cause notice dated 02.07.2010

was issued after scrutiny of sale details and bills issued by Alpha from the DFS located in departure area. Investigation revealed that the appellant has issued bills without mentioning requisite details like passenger name, passport number, nationality, flight number, etc in a large number of sale bills, it was noticed that the appellant has issued such bills in the name of one Mr. Manish with passport number A-1425369. The same name and passport number appeared in as much as 60 sale bills said to have travelled from various flights on the same day. Many other passport numbers found in the bills including the above number were found to be not genuine upon enquiring from Regional Passport Office in Delhi. In the light of such firm evidence, regarding falsification of record and admission by various employees of the appellant, demand for customs duty of about Rs. 6,30,38,783/- is fully justified and hence sustained.

27. The show cause notice dated 26.03.2012 has been issued after scrutiny of various bills other than those covered by SCN dated 02.07.2010. As a result of enquiries made to various airlines as well as FRRO, the names of passengers who have not travelled but whose name has appeared on these bills have been identified and duty demand worked out in respect of sale of goods to those passengers have been identified and duty demand has been raised. The argument raised by the appellant in this regard is that more than one SCN cannot be issued for the same period. The importer has also relied upon

various case laws which have dealt with the limitation period within which the SCN has been issued. After perusal of various case laws cited, we find that the settled position of law is that once a SCN has been issued for a certain period on certain set of facts, then on the same set of facts another SCN cannot be issued invoking the extended period of limitation on the plea of suppression of facts. In the present case, the show cause notices have been issued on an entirely different ground and entirely different circumstances. Show cause notice dated 02.07.2010 has been issued on the basis of recovery of documents and statements recorded and were based on the allegations of falsification of the records. The show cause noticed dated 26.03.2012 has been issued on entirely different ground and was issued on the ground that the appellant sold bottle of liquor unauthorisedly to domestic passengers and not to international passengers.

28. Further, it is seen that the various case laws relied upon by the appellant, as well as, the decision of Hon’ble Supreme Court in the case of ***Nizam Sugar Factory*** have dealt with demand made under section 11 of the Central Excise Act 1944 by invoking the extended period. However, in the present case, the show cause notice has been issued by raising the demand in terms of section 72 of the Customs Act. 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 number 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 11(A) 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.

29. For the reasons outlined above, we find no infirmity in the issue of more than one show cause notice covering the same period.

30. The appellant has raised the argument that DFS is located beyond the customs frontier of India and the goods sold must be considered to have been sold before such goods

cross the customs frontiers of India. Accordingly, it has been argued that no duties payable by the appellant who was a DFS but the same has to be paid by the passenger who purchased the goods who is the importer. They have also relied upon the decision of the Supreme Court in the case of ***Hotel Ashoka*** (Supra). The further argument raised by the appellant is that duty free shops cannot be treated as a bonded warehouse for the purpose of Customs Act and hence even if DFS was operated in an irregular manner, it can only be considered as violation of bonded warehouse licenses and no customs duty can be demanded.

31. We find that the identical arguments were raised before the adjudicating authority who has discussed the same as under:

"60.1 I have considered the above submissions of the notice, I observe that in para 4.1 of Public Notice no. 05/2006 dated 27.02.2006 it has been made explicit that "the DFS shall be sold by the Licensee only to the international passengers and on obtaining from them the payment in approved foreign currency or Indian currency as per the notifications issued by the CBEC from time to time. Every sale shall be covered by a sale voucher (which shall be deemed to be shipping bill or bill of entry under section 69 & 68 of the Customs At, 1962 as the case may be) which inter alia shall show, the name of the passenger to whom the sales are effected, the passport number identity of passenger no. and date, description of goods and flight. The passenger shall append his signature on the bill as per his signature in the passport. The sale voucher should be

serially numbered and prepared in duplicate, the original for the passenger and the duplicate for the duty free shop. The latter copy should be available for inspection by the Customs officer at all reasonable times. Thus I find that assertions made by the notice are incorrect and not relevant. This argument of the notice is merely for the sake of it. If duty free shops are beyond Customs frontiers and therefore out of administrative control of the customs officers, then why in the first place have at all a procedure for sale of such goods from duty free shops been prescribed. In this regard, reference is invited to the law as laid down by the CESTAT in the case of Flemingo Duty Free Shops Pvt. Ltd. 2009 (248) ELT 69 (Kar.) wherein the Hon'ble Court categorized the Duty Free Shops as customs Bonded warehouses within the meaning of Section 58 of the Customs Act, 1962. These obviously cannot therefore be construed to be outside of Indian Customs Frontiers. The Hon'ble Court in the said case has noticed as:

> *"The petitioner has obtained a licence under Section 58(1) of the Customs Act, 1962, to operate as a private bonded ware house for the storage of goods brought from abroad, to be sold to transit international passengers against approved foreign currency.*
>
> *The petitioner's place of business is inside the airport premises at the international departure and arrival terminals. The petitioner's shops consist of two units, one selling goods to outgoing international passengers alter they have passed out of the customs post. The other selling goods to incoming international passengers, before they pass through the customs post. Hence, the outgoing passengers purchase the goods after they have crossed the customs frontier and such goods are not brought into India. And the incoming passengers, after the purchase of goods, import the same into India when they pass through after obtaining clearance from the customs authorities.*

It is the petitioner's case that the transactions are in respect of specified goods and subject to the following :-

(a) Sale of goods are only to international passengers with valid travel documents.

(b) Sale only in foreign currency.

(c) Invoices to be counter-signed by the Customs officials.

(d) Transactions are according to Guidelines issued from time to time by the Customs Department.

It is contended that the activities of the petitioner, insofar as the warehousing of goods brought from abroad and replenishment of goods in the shop from the ware house, are at all times supervised by the Customs Officials. The petitioner has no access to the goods without the leave of the Customs Authorities.

It is contended that the sales from the Duty-free shops located at the arrival terminals of the international airport are in the course of import and are not local sales or sales within the State of Karnataka. There is a limit on the extent of goods that can be sold to each passenger. This further ensures that the goods purchased are for self-consumption and not for re-sale or distribution. The incoming passenger imports the goods purchased.

The sale in respect of goods at the departure terminal is concerned, once the outgoing passengers purchase the goods they take them out of India, without passing or re-passing, through the Customs Frontier - since they would have crossed it before entering the Duty-free shop. Hence, the goods brought by the petitioner from abroad, when sold to outgoing passengers, such goods leave the country without becoming part of the "mass of goods within the country" and thus the import cannot be said to be completed as it does not cross the Customs Frontier, before being taken out of the country."

60.2. The Hon'ble Court's observations in para 6 of the judgment in consideration of the applicability of the provisions of Standards of Weight and Measures (packaged commodity) Rules 1977, clearly throws out the argument (Duty free shops are outside Customs Frontiers of India) of the notice to the woods."

32. We also find that the decision of the Apex Court in the case of ***Hotel Ashoka*** (Supra) has been rendered in a totally different context and has dealt with the levy of commercial taxes and not customs duty. Hence the facts of the case are not applicable in the present case.

33. The decision of the Hon'ble High Court of Karnataka in the case of ***Flemingo Duty Free Shops Pvt. Ltd. 2009 (248) ELT 69 (Kar.),*** discussed by the Adjudicating Authority has settled the issue that duty free shops are to be considered as bonded warehouses within the meaning of section 28 of the Customs Act as it is distinguishable.

34. The appellant has challenged the valuation of goods adopted by the Adjudicating authority in quantifying the customs duty demand. It has been argued that the profit margin has not been properly taken for different types of liquor. Even rates of duty have been alleged to have been not properly taken.

35. We find that the adjudicating authority has discussed these arguments at length in para 63 which is reproduced below:

"I have carefully considered the submissions made by the noticee with regard to valuation of goods and applicable rate of customs duty for the purpose of calculating Customs Duty leviable on the goods under reference. I find that the notice have failed to provide any documentary evidence to substantiate their submissions although they are in possession of all the relevant documents and records and have merely laid out a statement without any supporting documents thereto in support of their contention. In the absence of the same I find that the methodology adopted by the Department to determine the value of the goods, is authentic and based on applicable and sound legal provisions. I do not find nay infirmity with the same and observe that the value of goods impugned herein has been determined in accordance with the provisions of Section 14 of the Customs Act 1962 (read with the Customs Valuation Rules framed thereunder). Further, the provisions of section 15 regarding "Date for determination of Rate of Duty and Tariff Valuation of imported goods" are also applicable in view of the stipulations contained in para 4.1 of the public notice no. 05/2006 dated 27.02.2006, which conveys, inter alia, that the bill issued by the duty free shops shall be deemed to be bill of entry or shipping bill as the case may be.

The relevant portion of the show cause notice reads as under:

> *"Further, in the present case valuation has been done to work out the import value, when the sale value has been provided by the notice, a calculation was done of the normal marking by the notice:-*

i) *By taking aggregate of the import value per unit, and the aggregate of the sale price per unit of the* *goods of (a) and (b) above which were found to be as of Rs.1,29,54,358/- and Rs.2,51,25,176/- respectively, and the same worked out ot be in the ratio of 100 : 193.95.*

ii) On the basis of (i) above, it was logically inferred that to fix the sale price of diverse products, M/s. Alpha, during the relevant period, usually made an addition, to the Import value, equal to 93,95% thereof, on account of profit and general expenses; and therefore, the value of the good of this category was arrived at by treating the sale price as equal to 193.95% of the import value. The sale price of item by the notice for each article has been taken at 193.95% of the import value and the import value has been worked out accordingly."

Further, the rate of customs duty at which the duty has been demanded by the Department has been correctly worked out in accordance with the provisions of the Customs Act, 1962. Since, in the present case the goods have been sold unauthorisedly from the duty free shop, the rate of duty applicable on the same will be the rate prevalent on the date of imports of goods, which has been so applied. However, the notice has not furnished any breakup or working in support of his contention to dispute the department's contention."

36. After perusal of record, we find no reason to interfere with the findings of the adjudicating authority. After going through the records of both the appeals we note that M/s. Alpha were issued customs bonded warehouse license and permitted to operate duty free shops in various areas of the IGI airport New Delhi. The customs department has thoroughly investigated into the facts of M/s. Alpha in terms of

the bond executed for the PBWL as well as conditions for grant of permission of running the DFS, which has been made with the strict condition that import of goods such as liquor, tobacco etc. 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 for DFS / PBWL have been complied by M/s. Alpha. The scrutiny of the documents relating to DFS and PBWL have revealed that the appellant have completely disregarded the conditions under which licenses were granted to them. Bills were found to have been issued without mentioning required details like name, passport number, flight number, etc. of the passenger to whom liquor has been sold. The scrutiny has further revealed that the employees of the appellant have fraudulently recorded false details pertaining to the passenger to whom liquor has been sold. Fake passport numbers and wrong names were found to have been routinely recorded. Many of the passport numbers, upon verification with regional passport office, were found to be bogus. The names of passengers recorded were found to have never travelled in international flights.

37. The statements recorded from various functionaries of M/s. Alpha have categorically established that such falsification of record was systematically carried out for diverting duty free imported liquor to domestic passengers in complete disregard

of the conditions under which PBWL as well as DFS licenses were issued to M/s. Alpha. The well designed fraud committed against Revenue came to light only with the detailed investigations undertaken.

38. The appellant has advanced a feeble argument that M/s. Alpha cannot be held responsible for the acts of omission or commission of their employees since they have engaged in such a misconduct for their personal gain and that the employer cannot be held liable for such acts.

39. M/s. Alpha were granted PBWL as well as permission to operate DFS. The investigation has revealed that through the action of the employees of M/s. Alpha, liquor has been sold to unauthorised passengers in clear violation of the terms of the bond executed. The acts of the employees have been done in their official capacity and are binding on the employer who cannot escape the vicarious responsibility. The duty free imported liquor, which had been warehoused, was found to be removed in contravention of the warehousing bonds. Consequently, the customs duty is required to be paid in terms of section 72 (1)(a). The goods cleared are also liable for confiscation. But, since the goods were not seized by the department no redemption fine can be imposed. However, the appellant will be liable for levy of penalties. The various employees of M/s. Alpha are also liable for penalty under section 117.

40. In view of the above discussions, we find no reasons to interfere with the orders in original dated 21.08.2012 as well as 17.05.2013. Both the orders in original are upheld for the detailed reasons given therein. Consequently, both the appeals filed are rejected.

[Pronounced in the open court on 12.09.2017]

(S.K. Mohanty) Judicial Member	(V. Padmanabhan) Technical Member

Bhanu