

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.405

Service Tax Appeal No. 88759 of 2018

(Arising out of Order-in-Appeal No. 133-136/GH/2017-18/Raigad dated 27/04/2018 passed by the Commissioner of CGST & CX Thane-Audit, Mumbai)

C.C.E., Belapur

.....Appellant

1st Floor, CGO Complex,
CBD Belapur,
Navi Mumbai-400 614

VERSUS

M/s Flemingo Airport Retail Pvt Ltd.

.....Respondent

D-73/1,
TTC Industrial Estate,
MIDC, Turbhe,
Navi Mumbai-400705

WITH

Service Tax Appeal No. 88760 of 2018

(Arising out of Order-in-Appeal No. 133-136/GH/2017-18/Raigad dated 27/04/2018 passed by the Commissioner of CGST & CX Thane-Audit, Mumbai)

C.C.E., Belapur

.....Appellant

1st Floor, CGO Complex,
CBD Belapur,
Navi Mumbai-400 614

VERSUS

M/s Flemingo Airport Retail Pvt Ltd.

.....Respondent

D-73/1,
TTC Industrial Estate,
MIDC, Turbhe,
Navi Mumbai-400705

WITH

Service Tax Appeal No. 88762 of 2018

(Arising out of Order-in-Appeal No. 133-136/GH/2017-18/Raigad dated 27/04/2018 passed by the Commissioner of CGST & CX Thane-Audit, Mumbai)

C.C.E., Belapur

.....Appellant

1st Floor, CGO Complex, CBD Belapur,

Navi Mumbai-400 614

VERSUS

M/s Flemingo Airport Retail Pvt Ltd.

.....Respondent

D-73/1, TTC Industrial Estate,
MIDC, Turbhe,
Navi Mumbai-400705

WITH

Service Tax Appeal No. 88763 of 2018

(Arising out of Order-in-Appeal No. 133-136/GH/2017-18/Raigad dated 27/04/2018 passed by the Commissioner of CGST & CX Thane-Audit, Mumbai)

C.C.E., Belapur

.....Appellant

1st Floor, CGO Complex, CBD Belapur,
Navi Mumbai-400 614

VERSUS

M/s Flemingo Airport Retail Pvt Ltd.

.....Respondent

D-73/1, TTC Industrial Estate,
MIDC, Turbhe,
Navi Mumbai-400705

APPEARANCE:

Shri Onil Shivdikar, Asst. Commissioner Authorised Representative for the Appellant

Shri A.R. Krishanan, Chartered Accountant with Shri Girish Raman, Chartered Accountant for the Respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86904-86907/2019

Date of Hearing: 03.07.2019

Date of Decision: 24.10.2019

PER: AJAY SHARMA

The instant Appeal has been filed by Revenue challenging the impugned order dated 27/04/2018 passed by the Commissioner of CGST & CX Thane-Audit, Mumbai in Order-in-Appeal No. 133-

136/GH/2017-18/Raigad Since the learned commissioner passed a common order in four appeals, therefore I am also disposing of these four appeals through this common order.

2. The issue to be decided is whether the Service tax borne by the Respondent-assessee, on the rent paid by them to Mumbai International Airport Ltd. (In short "MIAL") for its two outlets in the International Airport at the departure terminal is eligible for rebate under Notification No. 41/2012-ST, dated 29.6.2012?

3. The facts of the appeal in brief are as follows. The respondent is in the business of operating shops/outlets at the departure terminal of MIAL. These shops/outlets are taken on rent by the respondent from MIAL. The respondent procured duty/tax paid goods like tobacco products, travel accessories, books, magazine etc. from the domestic market and sold them at its outlets at the departure terminals at Mumbai International Airport to the outgoing international passengers. Out of them, two outlets of the respondent are situated at Security Hold Area (in short "SHA"). SHA is the area wherein passengers travelling abroad have to wait after clearing the immigration formalities but before boarding the international flight. The goods sold from there, cannot be brought back to the area situated before the clearing of immigration formalities. It is the case of the respondent-assessee that since there was no option but to take the goods out of India which were purchased from these two outlets, therefore the sales at these outlets in SHA have to be considered as "Export" and therefore the respondent claimed rebate by way of refund of Service Tax on rent paid to MIAL in respect of

these two outlets located at the SHA in the departure terminal. The period involved and the amount of refund claim involved in these appeals are as under:-

Sr.No.	Period of claim	Amount of rebate
1.	Oct, 2015 to Dec, 2015	Rs.12,31,247/-
2.	Jan, 2015 to March, 2015	Rs.10,78,569/-
3.	July, 2015 to Sept,2015	Rs.12,28,575/-
4.	April, 2015 to June, 2015	Rs.11,28,911

4. The Adjudicating Authority through four separate Orders-in-Original, sanctioned the refund of the amount claimed by the respondent-assessee. Aggrieved, Revenue filed four Appeals before the Commissioner (Appeals) and the learned Commissioner vide common impugned order in all the four Appeals, while relying upon the Tribunal's decision in respondent-assessee's own case on the identical issue, upheld the Adjudication Order and dismissed the Appeals filed by Revenue.

5. I have heard learned Authorised Representative for the Appellant and learned Chartered Accountant for the respondent-assessee and perused the Memo of Appeal alongwith its annexure including the written submissions filed by the learned Chartered Account for the respondent. According to learned Authorised Representative for the Revenue, since goods have not taken out of India from a place in India therefore there is no export nor the respondent is a exporter. He further submitted that the goods sold are not manufactured in India hence it does not qualify as exports. The learned Authorised Representative further submitted that input service of running of space has no nexus with the claimed export goods and also that the refund is barred by the principle of *unjust*

enrichment. The learned Chartered Accountant appearing for the respondent-assessee supported the findings recorded in the impugned order and submitted that the respondent has procured the duty/tax paid goods from the domestic market and sold the same at their departure terminal located in the Security hold area of the Airport. He further submitted that the respondent has never mentioned that these two outlets are *duty free shops*. According to the learned Chartered Accountant, the goods sold at these outlets of the respondent located in the SHA at the departure terminal are bound to be taken out of India to a place outside India and therefore the selling of the goods at these outlets are “export” and from that point of view the respondent would be an “exporter”. The passenger is only the carrier and not the exporter as claimed by the revenue. Learned Chartered Accountant further submitted that the input service of renting of space has direct nexus with the sale of goods claimed as export. So far as the issue of *unjust enrichment* is concerned, learned Chartered Accountant would submit that as per clause (a) of proviso to Section 11B(2) of Central Excise Act, 1944 as applicable to Service Tax vide Section 83 of Finance Act, 1994, the question of unjust enrichment does not arise in case of export transactions. Otherwise also he submits that no service tax or excise duty is charged or recovered in the export invoice. According to him, input service of renting of space has nexus with the claimed export goods.

6. Before deciding the issue involved in this Appeal, it is necessary to find out whether the sale of goods from these two

outlets of the respondent to the passengers going abroad amount to 'Export'? While going through the case records, I find that the respondent-assessee has procured duty/tax paid goods from domestic market and sold them at its departure terminal outlets located in the SHA to the international passengers going abroad. It is true that there was no option for the passengers going abroad but to take the goods out of India which were purchased by them from these two outlets of the respondent-assessee. Although according to the respondent these outlets are not the duty free shops, but had it been a duty free shop still the situation would not have been different. In a recent decision, the Hon'ble High Court of Judicature at Allahabad in the matter of *Atin Krishna vs. UOI; reported in 2019 (25) G.S.T.L. 390 (All.)* has held that the supply of warehoused goods by the Duty Free Shops at the departure terminal is to the departing International passengers i.e. the passengers travelling from India to a foreign destination. Thus, the goods supplied are never cleared for home consumption and the warehoused goods are exported by the Duty Free Shop, therefore the levy Customs duty and of the IGST do not arise. The relevant paragraphs of the aforesaid decision are as under:-

"22. Since the entire activity of a DFS namely, warehousing, stocking and sale/ supply happens as per the provisions under Chapter IX of the Customs Act and under Customs supervision and control. The sale of goods takes place only to International passengers and on obtaining from them payment in approved currency. Every sale is covered by a sale voucher, which shall be deemed to be the Shipping Bill or Bill of Entry under Section 69 or 68 as the case may be. As a condition of the license granted to DFS under

Section 58A of the Customs Act, DFS are permitted to deposit the goods at the warehouse without payment of duty on execution of a bond. As per Section 71 of the Customs Act, the goods so deposited can either be cleared from the warehouse for home consumption (u/s 68) or for export (u/s 69) or for removal to another warehouse or otherwise provided in the Customs Act. Further Section 73A, Custody and Removal of Warehoused Goods, of the Customs Act provides that all warehoused goods shall remain in the custody of person who is granted a license under Sections 57/58/58A of the Customs Act until they are cleared for home consumption or transferred to another warehouse or are exported or removed as otherwise provided in the Customs Act. Such warehoused goods are thereafter only allowed to be cleared for home consumption after filing a bill of entry under Section 68 and payment of duty. In the event where the warehoused goods are not cleared for home consumption, they can be cleared for export, without payment of duty under Section 69 after filing shipping bill for export.

23. The Public Notice dated 22-7-2004 [Para 4.1], Standing Order dated 3-3-2008 (Para 3.3) and Public Notice dated 21-12-2018 [Para 7.1] submitted by the respondent No. 3 further clarifies that the invoice issued to passenger at International departure terminal is deemed to be a "shipping bill" for the purpose of exports under Section 69 of the Customs Act and the Section 50 of the Customs Act provides that a 'shipping bill' has to be presented to the customs officer for export of goods in an aircraft.

24. It is clear that the goods sold to passengers at the International departure terminal DFS are not cleared for home consumption nor for removal to another warehouse or otherwise provided in the Customs Act, 1962 and hence the goods are cleared without payment of duty only for export under Section 69 of the Customs Act under an invoice which is also deemed to be a shipping bill.

25. Hence the sale/supply at the International departure terminals DFS would be export of goods under Customs Law

and therefore will be considered as exports of goods under GST Act, since the definition of “export” and “export of goods” under both the laws is the same.

26. The supply from DFS of the respondent No. 3 at departure terminal of the Airport is similar to a FOB export, the only difference being that in the case of DFS supply, the International passenger also acts as carrier of goods out of India.

27. The Bombay High Court in the case of Sandeep Patil (supra) has taken a similar position with respect to DFS which reads as under :-

“6. Respondent No. 2 while selling the goods from its duty free shops at departure terminal hold themselves as exporters of the goods and therefore it falls under the ambit of “exporter” as defined in section 2(20) of the Customs Act, 1962. Applying the definition provided in the Customs Act, in this context, the goods supplied to the duty free shops by the Indian and international manufacturers/suppliers are ‘exported goods’ and on reading this definition in conjunction with the definition of exporter, it is clear that the duty free shop operator is the “exporter” and the supply of goods to the international passengers is an export.

8. The above policy shows that the export oriented units which undertake to export their entire quantity of goods and services, are permitted to do so by setting up retail outlets i.e. duty free shops at International Airports. Even as per the FTP of India, sales undertaken from the said duty free shops are exports and the duty free shop operator is the exporter. It is also worth to mention that COTPA itself provides for reasonable restriction wherever the legislature intended to impose such restriction.

11. In the matter of DFS India Private Limited v. Commissioner of Customs, the Apex Court took cognizance of the fact that business undertaken at the departure duty free shop is in the nature of export. In fact pursuant to this order, the stocks of tobacco products held by respondent No. 2 at duty free shops came to be released by the Department of Customs after being satisfied that the business undertaken from the duty free shops at departure is export. In pursuance of this order of the Apex Court, the High Court in the matter of DFS India Pvt. Ltd. v. The Commissioner of Customs also granted final relief in favour of respondent No. 2. If the legislature intent which is also supported by various precedents noted above, is not to extent the restriction under the COTPA to shops situated beyond India and not to apply the restrictions on passengers importing tobacco products, that is not trade or commerce. Even in GST regime, duty free shops at international airports are considered non-taxable area and their sales whether at arrival or departure lounge are considered as export.”

*28. The claim of the petitioner is that there is no 'export' of goods since the goods do not have a specific destination. It is however, observed that the facts of the four cases relied upon by the petitioner in the present petition are of a different nature as compared to the operation undertaken from the DFS. In all the four cases, the destination of the goods were very clear viz aircraft (in *Burmah Sheel and Narang Hotel*) and ship (in *Coching Coal and Madras Marine*). Thus, the destination was within the Indian territorial waters. In the present case of DFS, it is very clear that if a foreign destination of the foreign going passenger, the passenger also acts as a carrier and the goods are appropriated outside India. In view thereof, it is clear that the decisions relied upon by the petitioner are misplaced, have no relevance to the facts of the present PIL and therefore cannot be relied upon in the context of the business undertaken by the answering respondent No. 3.*

29. In view of above discussion, we find that exemption under GST on goods supplied to and from DFS is rightly conferred and the claims of any accumulated unutilized ITC are refundable to respondent No. 3. The petition is devoid of merit and the same deserves to be dismissed.

30. Accordingly, we dismiss the Public Interest Litigation.

31. No order as to cost."

In the aforesaid decision, the Hon'ble High Court has specifically observed that in a foreign destination of the foreign going passenger, the passenger acts as a carrier and the goods are appropriated outside India. The goods sold by the respondent-assessee to passengers at the International departure terminal are neither cleared for home consumption nor for removal to another warehouse or otherwise provided in the Customs Act, 1962 and these goods are cleared without payment of duty only for export under Section 69 of the Customs Act under an invoice which is also deemed to be a shipping bill. The Public Notice dated 22.7.2004 issued by the

Customs, Chennai, Standing Order dated 3.3.2008 issued by Mumbai Customs and Public Notice dated 21.12.2018 also clarifies that the invoice issued to passenger at International departure terminal is deemed to be a “shipping bill” for the purpose of exports under Section 69 of the Customs Act and the Section 50 of the Customs Act provides that a ‘shipping bill’ has to be presented to the customs officer for export of goods in an aircraft. It is not the case of the department that the sales are to the passengers travelling on domestic flights nor it is the case of the department that the goods sold at these outlets are cleared for home consumption or for removal to another warehouse. Therefore the sale of goods at these outlets at the International departure terminals is an export of goods under Customs Act. The respondent can very well claimed to be an exporter under Section 2(20) of the Customs Act, 1962 since it is the respondent who is the seller and is selling the goods in the SHA at the International departure terminal to the international passengers going abroad. These goods are ultimately taken outside India by those passengers. In this way the passengers can be termed as carrier only and not the exporter of those goods. The exporter is the respondent. Therefore the issue of unjust enrichment will not arise here.

7. Earlier also between the same parties for earlier years, twice this issue came up before this Tribunal and in both the cases this Tribunal decided in favour of the assessee-respondent. In the matter of *Commissioner, Service Tax-VII vs. Flamingo Duty Free Shop Pvt. Ltd.*; 2-17-TIOL- 3477-Cestat-Mum. this Tribunal while dismissing

the Appeal filed by Revenue, upheld the order of the Commissioner (Appeals) that the respondent-assessee is eligible for rebate under notification No.41/2012-ST, dated 29.6.2012. In another decision of this Tribunal in respondent-assessee's own case, this Tribunal in the matter of *Commissioner of Service Tax-VII vs. Flemingo Duty Free Shop Pvt. Ltd.*; 2018(8) GSTL 181(Tri-Mum) again upheld the decision of the Commissioner (Appeal) therein and recorded that the respondent-assessee is eligible for rebate under the aforesaid notification dated 29.6.2012. In the said decision, the Tribunal also rejected the plea of unjust enrichment raised by the department. Although in the instant Appeal, one of the grounds raised by the revenue is that the aforesaid decision of the Tribunal reported in 2018(8) GSTL 181 (Tri-Mum), which has been relied upon by the learned Commissioner while dismissing the Appeal filed by the department, has not been accepted by the department and the department has filed application for Rectification of Mistake in the said matter and the same is pending before the Tribunal, but the learned Chartered Accountant submits that the said Rectification of Mistake application filed by the department has also been dismissed by this Tribunal by a detailed order dated 26.10.2018. It is not the contention of the Revenue that any appeal has been filed by them against the aforesaid two decisions of the Tribunal in respondent-assessee's own case, therefore judicial discipline demands that I should follow these decisions of the Tribunal in assessee's own case, which are directly on this issue and are still holding the field. Technically also, in my view the appeals filed by Revenue are not

maintainable as it has come to my notice that after reserving the orders in these Appeals by this Tribunal on 1.7.2019, the Ministry of Finance, Department of Revenue have brought out a litigation policy vide instruction dated 22.08.2019 which is applicable to pending cases as well. According to the said policy the threshold financial limit for filing Appeal before the Tribunal is Rs. 50 lakhs. Meaning thereby that the Appeal filed by the Revenue in which the amount involved is less than Rs. 50 lakhs are not maintainable before the Tribunal. The Appeals are said to be pending till the passing of the final decision. As per the table made in earlier paragraph, the amount involved in all the four appeals filed by Revenue is either Rs. 12 lakhs or less, which is much lower than the threshold limit fixed by the aforesaid litigation policy, therefore on that ground also the appeal filed by the department is liable to be dismissed, but still, since the litigation policy dated 22.08.2019 is of a later date i.e. the date after the conclusion of hearing and reserving of orders in these Appeals, in order to avoid any debate as to whether these appeals falls under the category of "pending cases" as on 22.08.2019 i.e. the date of litigation policy, I am deciding these Appeals on merits.

8. In view of the discussions made hereinabove, I am of the view that the goods sold by the respondent-assessee at its outlets situated at the Security Hold Area at the departure terminal of Mumbai International Airport, are exports and the respondent is an exporter and the respondent-assessee is therefore eligible for rebate under Notification No.41/2012, dated 29.6.2012. Therefore, the

Appeals filed by Revenue are devoid of any merit and are accordingly dismissed.

(Order pronounced in the open Court on 24.10.2019)

(Ajay Sharma)
Member (Judicial)

SB