



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 8034 OF 2018

A-1 Cuisines Private Limited
Through its Authorized Signatory
189-191, Dr.D.N.Road,
Ground Floor Opp. Central Bank
of India, Fort, Mumbai-400001,
Maharashtra.

..... PETITIONER

// **VERSUS** //

1. Union of India,
Through Secretary,
Ministry of Finance,
North Block,
New Delhi – 110 001.

2. State of Maharashtra,
through the Secretary,
Department of Finance,
Mantralaya, Madam Cama
Road, Hutatma Rajguru
Square, Nariman Point,
Mumbai 400 032.

..... RESPONDENTS

Mr.S. Kantawala, Advocate with Mr.A.M.Sudame,
Advocate for Petitioner.

Mr.S.A.Chaudhari, Advocate for Respondent No.1.

Mr.A.D.Sonak, A.G.P. for Respondent No.2.

CORAM : P. N. DESHMUKH
AND
MRS. SWAPNA JOSHI, JJ.

DATED : 28th November, 2018.

ORAL JUDGMENT (Per P. N. Deshmukh, J) :

1. Present petition is filed by the petitioner seeking issuance of Writ of Mandamus directing the respondents to exempt the petitioner from charging applicable taxes under the GST Legislations on sale of cosmetic products, perfumes etc. to the International passengers and claim refund of any input tax paid on input supplies and input services from the retail shop which the petitioner intends to set up at the Domestic Security Hold Area at Dr.Babasaheb Ambedkar International Airport (hereinafter referred to as “**the Nagpur Airport**”).

2. It is submitted that presently sale of similar products to international passengers are permitted without levy of Customs duty and applicable taxes under the CGST/IGST/SGST from the duty free shops located in the arrival and departure halls of “International Airports” in India. Petitioner, therefore, claims that similar benefit should be granted to him so that he can sell the products to International passengers who commence their journey from Nagpur Airport and thereafter, depart from India from a transit International Airport in India from his shop located at the Domestic Security Hold Area at Nagpur. Learned Counsel for the petitioner submitted that since the process of tender for grant of such shop is in progress and in the event the petition is allowed, petitioner would be able to aggressively participate in the tender process and will be able to sell products without levy of taxes under the GST Legislation to International passengers, who, after purchasing these products from the shop, will be able to depart from India after taking connecting International flight from the transit International Airport. It is further submitted that a duty free operator operating in India imports goods like liquor, tobacco products, souvenirs, eyewear, watches, fashion, chocolates, perfumes etc. by filing import general manifest and Bill of Entry for warehousing with the Customs

department without payment of import duty on the first importation subject to certain conditions. The Bill of Entry clearly indicates the duty free operator as an “importer”. The imported goods are warehoused at a bonded warehouse. Further the Bill of Entry also discloses that the goods imported are for “sale only for Duty free shop/export.”

Similarly, it is also submitted that the duty free operator also takes on rent a private bonded warehouse located near the Airport as well as certain shops called 'duty-free shops' at the arrival and departure terminals of the International Airports in India. The duty free operator is granted special warehouse license under Section 58A of the Customs Act, 1962 for depositing notified class of goods and such warehouse are kept locked by the proper Officer and no entry of any person or removal of goods therefrom are allowed without the permission of the proper Officer. The goods are warehoused at the Special Warehouse without payment of duty and then transferred to the duty-free shops without payment of duty from where they are sold to International passengers without payment of duties and taxes.

3. According to petitioner, the entire movement of goods from Special warehouse to duty free shops for the purpose of sale at arrival and departure strictly happens as per the Warehousing provisions under Chapter IX of the Act and under customs supervision and control. As per Section 71 of the 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 this Act. The petitioner submits that the goods so warehoused are then brought to the duty-free shop without payment of duty under escort of the bond Officer. The goods are then sold at the duty free shops at arrival and departure terminals. The subsequent sales at duty free shops are under general supervision and control of the Customs Officer and that the goods are sold at the duty free shops to the International passengers at the arrival and departure terminals by issuing a sales invoice which disclose inter alia the name of the passenger, flight details, passport number, etc. and is available for inspection by the Customs Officer. These details are also entered in the computer of the operators and are available for inspection by the Customs Authority.

4. The petitioner submits that with effect from July, 2017, the respondent no.1 promulgated and notified CGST, IGST and various State Governments promulgated SGST. That by virtue of enactment of the GST Legislations, more specifically Proviso to Section 5(1) of the IGST, an importer of goods is liable to levy of integrated tax on goods imported into India. In the case of Intra-State supply, when the location of the supplier and the place of supply i.e. location of the buyer are in the same State, a seller has to collect both CGST and SGST from the buyer. The CGST gets deposited with Central Government i.e. respondent no.1 and SGST gets deposited with respondent no.2. The petitioner submits that, due to unique location and nature of business of the duty free shops in India, the duty free operator is neither charged IGST/customs duty on imports nor is required to collect tax under CGST and SGST on the supplies made to the International passengers.

5. In the background of case of petitioner as aforesaid, it is, therefore, prayed that petitioner be allowed to sell products to International passengers without duty and levy under CGST and SGST from the shop proposed to be operated by petitioner and had sought further direction that petitioner shall be eligible to claim

refund of any taxes paid on any supplies and input services from his shop in the event his tender for having such shop at Nagpur Airport is granted to him.

6. In the context of above facts, petitioner relied on the case of M/s. Hotel Ashoka (Indian Tourism Development Corporation Limited) vs. Assistant Commissioner of Commercial Taxes and Another (Civil Appeal No.2560 of 2010) reported in 2012 (276) ELT 433 (SC) and on the order of Excise and Service Tax Appellate Tribunal West Zonal Bench, Mumbai in the matter of Commissioner, Service Tax-VII vs. Flemingo Duty Free Shop Pvt. Ltd. (Appeal No.87234-41/2016), dated 28.09.2017, wherein law laid down in the case of Hotel Ashoka (supra) is relied and Central Government's order dt.31.8.2018 bearing No.634/2018-CUS(WZ)/ASRA/MUMBAI passed under Section 129DD of the Customs Act, 1962 in the case of Aarish Altaf Tinwala.

7. To sum up, it is the case of petitioner that presently a lot of International passengers take their flights from the Nagpur Airport to travel outside India through a transit International Airport. An International passenger who departs from the Nagpur Airport to a

transit International Airport wherefrom he/she can embark the International flights to foreign destination can get their baggage through checked in at the Nagpur Airport and the Nagpur Airport also issues the said International passenger boarding passes for the flight which travels to the transit International Airport as well as the International flights which departs India. The petitioner submits that once an International passenger through checks in and receives boarding passes at the Nagpur Airport, the products can be sold to him/her without duty and GST. The only difference here is that the International passengers, after reaching the transit International Airport, will complete the immigration formalities and will depart from India after embarking the International flight from the transit International Airport.

8. We have carefully considered the submissions of the petitioner in the instant petition and have perused the provisions of Article 286 of the Constitution of India, GST laws, Customs Act, 1962 and Finance Act, 1994. We have considered the Judgment of the Hon'ble Supreme Court in the case of Hotel Ashoka (supra). We have also perused the two Orders of the CESTAT and of the Central

Government following the case of Hotel Ashoka, which are relied upon by the petitioner.

9. The Government of India in case of Aarish Altaf Tinwala by its order dt.31.8.2018 dismissed the revision of applicant filed by International passenger on relying the case of M/s. Hotel Ashoka (cited supra) observing that :

“8. The applicant has vehemently pleaded that once he has completed the immigration formalities, he is said to have entered Indian Territory. Thereafter, the goods purchased from the duty free shop situated in the Arrival Hall are not imported. Hence, any such purchases made from the duty free shop are not liable for imposition of customs duties. Therefore, the impugned goods have been wrongly confiscated by the Customs and should be released.

9. The Central Government is of the considered opinion that the contentions of the application are based on the erroneous belief and wrong interpretation of the law and settled legal positions.

10. Section 2(11), Section 2(25) and Section 2(27) of the Customs Act 1962 states as under :-

“Section 2 : Definitions – In this Act unless the context otherwise requires :-

(11) **“customs area”** means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by the Customs Authorities;

(25) **“imported goods”** means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;

(27) **India** – includes the territorial waters of India.”

11. The Central Government however observes that the duty free shops though being physically located in Indian Territory, are specifically treated as being located outside the Customs Territory of India. duty free shops are located in the Customs Area defined under Section 2(11) and it includes any area where the imported goods or export goods are kept before clearance by Customs authorities. Goods sold by duty free shops are not duty paid goods and such goods are deposited in a customs

bonded premises/ware houses, licensed under Section 58A of the Customs Act, 1962 without payment of duty. Section 71 clearly mandates that no goods shall be taken out of a warehouse except clearance for home consumption, exportation or removal to another warehouse or as otherwise provided by this Act. It is thus clear that such goods need to suffer Customs duty on being exported by duty free shops and imported by passenger in terms of Section 77 of the Customs Act, 1962. The contention of the Applicant that he had entered Indian Territory after immigration formalities and having bought goods within the confines of Indian Territory and is, therefore, not liable to pay customs duty is not legally sustainable.

12. The Hon'ble Supreme Court of India in the case of M/s. Hotel Ashoka vs. the Assistant Commissioner of Commercial Taxes and Anr. (Civil Appeal No.2560 of 2010) reported in (2012) 3 SCC 204 has held that -

“18. It is an admitted fact that the goods which had been brought from foreign countries by the appellant had been kept in bonded warehouses and they were transferred to duty free shops situated at International Airport of Bengaluru as and when the stock of goods lying at the duty free shops was exhausted. It is also an admitted fact that the appellant had executed

bonds and the goods, which had been brought from foreign countries, had been kept in bonded warehouses by the appellant. When the goods are kept in the bonded warehouses, it cannot be said that the said goods had crossed the customs frontiers.

The goods are not cleared from the customs till they are brought in India by crossing the customs frontiers. When the goods are lying in the bonded warehouses, they are deemed to have been kept outside the customs frontiers of the country and as stated by the learned senior counsel appearing for the appellant, the appellant was selling the goods from the duty free shops owned by it at Bengaluru International Airport before the said goods had crossed the customs frontiers. ”

“30. They again submitted that 'in the course of import' means 'the transaction ought to have taken place beyond the territories of India and not within the geographical territory of India.' We do not agree with the said submission. When any transaction takes place outside the customs frontiers of India, the transaction would be said to have taken place outside India. Though the transaction might take place within India but technically looking to the provisions of Section 2(11) of the Customs Act and Article 286 of the Constitution, the said transaction would be said to

have taken place outside India. In other words, it cannot be said that the goods are imported into the territory of India till the goods or the documents of title to the goods are brought into India.

Admittedly, in the instant case, the goods had not been brought into the customs frontiers of India before the transaction of sales had been taken and, therefore, in our opinion, the transactions had taken place beyond or outside the custom frontiers of India.”

10. Therefore, the Central Government, in view of the above holds that the transactions effected at the duty free shops at the arrival or departure of the International Airports in India might have taken place within the geographic territory of India, but for the purposes of levy of Customs Duties or any other taxes, the area of duty free shops shall be deemed to be the area beyond the customs frontiers of India. Although, the applicant bought goods from duty free shop at CSI Airport Mumbai, the same are deemed to be imported from across the Customs Frontiers of India and customs duty is payable on such goods. Since the applicant crossed the green channel without declarations and without payment of customs duty, the department has rightly proceeded against the Applicant.

11. The Central Government has thus applied the ratio laid down by Hon'ble Supreme Court in Hotel Ashoka (supra) and correctly held that the transactions effected at the duty free shops at the arrival or departure of the International Airports in India located after the passenger clears immigration might have taken place within the geographic territory of India, but for the purposes of levy of Customs Duties or any other taxes, the area of duty free shops shall be deemed to be the area beyond the customs frontiers of India and the transaction would be said to have taken place outside India.

12. The aforesaid Judgments are clearly applicable only in respect of supplies to or from duty free shops situated after the passenger crosses the immigration counter beyond the Customs Frontiers, at arrival or departure hall of International Airport Terminals, where the transaction would be said to have taken place outside India. The International travel of incoming or outgoing passenger after immigration clearance would be beyond any doubt. In such event, whether it is the sale/purchase/supplies of goods or services, to or from such duty free shop, the same is said to be taken place outside India. Hence, the same would be a “non-taxable supply” under Section 2(78) of CGST/SGST and such duty free

Shops located at the International Airports would be in “non-taxable territory” as defined in Section 2(79) of CGST/SGST. As per section 2(24) of IGST, the same meaning as given in CGST/SGST applies for IGST as well.

13. Whereas in the GST regime, the aforesaid Judgments would squarely apply for the sale/purchase/supplies of goods or services to or from duty free shop situated after the passenger crosses the immigration counter at arrival or departure hall of International Airport Terminals; however, they would have no application to shops located at a domestic Airport or Domestic Security Hold Area, which are before even the immigration clearance by a passenger, where the transaction cannot be said to have taken place in any area beyond the customs frontiers of India or outside India. Even otherwise, a passenger travelling on a domestic flight from Nagpur may or may not travel abroad, and the Customs Authorities would not be able to have effective check and control to verify whether the goods purchased from Domestic Airport at Nagpur are actually taken abroad by the passenger.

14. We are thus unable to agree with the petitioner and find no merit in this petition. No case is made out even on prima facie basis to issue any directions or any notice in that regard. With the above observations, the petition stands dismissed.

JUDGE

JUDGE

[jaiswal]