CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 51853 OF 2021

(Arising out of Order-in-Appeal No. Comm(A)-11/2021-22 dated 23.09.2021 passed by the Commissioner of Central Tax Appeals-II, New Delhi)

M/s Delhi Duty Free Services Pvt. Ltd. **...Appellant**
Building No. 301, Ground Floor,
Opposite Terminal-3 Indira Gandhi International Airport
New Delhi

versus

The Commissioner, Central Tax, **...Respondent**
Division - Vasant Kunj, New Delhi

WITH

SERVICE TAX APPEAL NO. 51827 OF 2021

(Arising out of Order-in-Appeal No. Comm(A)-11/2021-22 dated 23.09.2021 passed by the Commissioner of Central Tax Appeals-II, New Delhi)

M/s Delhi Duty Free Services Pvt. Ltd. **...Appellant**
Building No. 301, Ground Floor,
Opposite Terminal-3 Indira Gandhi International Airport
New Delhi

versus

The Commissioner, Central Tax, **...Respondent**
Division - Vasant Kunj, New Delhi

APPEARANCE:

Shri Tarun Gulati, Senior Advocate and Sparsh Bhargava and Shri Sanjay Gulati, Advocates for the appellant.

Shri Mihir Ranjan, Special Counsel for the Respondent

WITH

SERVICE TAX APPEAL NO. 50901 OF 2020

(Arising out of Order-in-Appeal No. 176/CentralTax/Appl-II/Delhi/2019 dated 26.05.2020 passed by Principal Commissioner, GST South, New Delhi- 110066)

Principal Commissioner, GST South, **...Appellant**
3rd Floor, EIL Annex Building,
Bhikaji Cama Place,
New Delhi-110066

versus

M/s Delhi Duty Free Services Pvt. Ltd. **...Respondent**
Building No. 301, Ground Floor,
Opposite Terminal-3, Indira Gandhi International Airport
New Delhi-110037

AND

SERVICE TAX APPEAL NO. 50902 OF 2020

(Arising out of Order-in-Appeal No. 175/CentralTax/Appl-II/Delhi/2019 dated 18.05.2020 passed by Principal Commissioner, GST South, New Delhi- 110066)

Principal Commissioner, GST South, **...Appellant**
3rd Floor, EIL Annex Building,
Bhikaji Cama Place,
New Delhi-110066

versus

M/s Delhi Duty Free Services Pvt. Ltd. **...Respondent**
Building No. 301, Ground Floor,
Opposite Terminal-3 Indira Gandhi International Airport
New Delhi-110037

APPEARANCE:

Shri Mihir Ranjan, Special Counsel for the appellant.

Shri Tarun Gulati, Senior Advocate and Sparsh Bhargava and Shri Sanjay Gulati, Advocates for the Respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 19.01.2023
Date of Decision: 28.02.2023

FINAL ORDER NO. 50230-50233/2023

JUSTICE DILIP GUPTA:

M/s. Delhi Duty Free Services Pvt. Ltd.[1] is engaged in the sale of goods from retail shops located at the customs area of Terminal-3, Indira Gandhi International Airport, New Delhi[2]. Variety of imported and indigenous goods are sold by the appellant to outbound and inbound international passengers from such duty free shops which operate at the departure and arrival terminals of the Airport. For

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1. **the appellant**
2. **the Airport**

granting license to the shops in the duty free area, agreements were executed between the appellant and Delhi International Airport Limited[3]. License fee, airport service charges, marketing fees and utility charges were included in the invoices issued by DIAL and service tax, krishi kalyan cess and swachh bharat cess were paid by the appellant under the provisions of the Finance Act, 1994[4]. A Division Bench of the Tribunal in **Commissioner of Services Tax-VII** vs. **M/s. Flemingo Duty Free Shop Pvt. Ltd.**[5], however, held on 28.09.2017 that the duty free area at the Airport qualifies as a non-taxable territory and, therefore, service tax would not be chargeable on the rent paid by such shops, whether they are in the arrival terminal or in the departure terminal. The Tribunal, therefore, held that the service tax charged on the rent paid for the duty free shops would be without authority of law and refund could be claimed.

2. The appellant, therefore, filed refund applications under section 11B of the Central Excise Act, 1944[6], seeking refund of the service tax, krishi kalyan cess and swachh bharat cess. The dispute in all the four appeals relates to the refund claimed by the appellant for three periods. The **1st period** is from October 2016 to December 2016[7]; the **2nd period** is from January 2017 to June 2017[8]; and the **3rd period** is from April 2010 to September 2016[9].

3. The period involved, the amount of refund claimed and the four Service Tax Appeals in which the dispute has been raised are provided in the following chart:

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3. DIAL
4. the Finance Act
5. 2018 (8) G.S.T.L. 181 (Tri.-Mumbai)
6. the Excise Act
7. the 1st period
8. the 2nd period
9. the 3rd period

Status of Refund of Service Tax

1st Period	2nd Period	3rd Period
October 2016 –December 2016 (Rs. 12.77 Cr)	**January 2017-June 2017 (Rs. 28.20 Cr)**	**April 2010 -September 2016 (Rs. 182 Cr)**
Refund was allowed by the Tribunal by order dated 14.08.2019 in ST/51447/2019. Appeal filed by the department is pending in the High Court (SERTA 8/2022). But the refund claimed by the appellant pursuant to the order passed by the Tribunal was rejected by the Assistant Commissioner by order dated 10.12.2020. The appeal filed by the appellant was rejected by the Commissioner (Appeals) by order dated 23.09.2021. **ST/51853/2021** has been filed by the appellant before the Tribunal to assail this order dated 23.09.2021.	Refund claim was allowed by the Assistant Commissioner by order dated 06.09.2018. The appeal filed by the Department before the Commissioner (Appeals) was rejected by order dated 18.05.2020. Department has filed **ST/50902/2020** before the Tribunal to assail this order dated 18.05.2020.	Refund was rejected by the Assistant Commissioner by order dated 27.06.2019 but the appeal filed by the appellant was allowed by Commissioner (Appeals) by order dated 26.05.2020. **ST/50901/2020** has been filed by the Department before the Tribunal to assail this order dated 26.05.2020. However, refund claim filed by the appellant pursuant to the order dated 26.05.2020 passed by the Commissioner (Appeals) was rejected by the Assistant Commissioner by order dated 10.12.2020. The appeal filed by the appellant was rejected by the Commissioner (Appeals) by order dated 23.09.2021. **ST/51827/2021** has been filed by the appellant before the Tribunal to assail this order dated 23.09.2021.

4. The aforesaid chart briefly mentions the issues involved in the four appeals, namely Service Tax Appeal No. 51853 of 2020, Service Tax Appeal No. 50902 of 2020, Service Tax 50901 of 2020 and Service Tax Appeal No. 51827 of 2021.

5. The facts giving rise to these four appeals are that the appellant had filed three refund applications, each dated 31.01.2018, for an amount of Rs. 40,62,18,793/- for the 1st and 2nd periods, pursuant to the decision of the Tribunal in **Flemingo**. A show cause notice dated 24.08.2018 was issued to the appellant proposing to reject the claim

for the 1st period on the ground that the claim was barred by limitation. The reply submitted by the appellant was not accepted and the Assistant Commissioner, by order dated 06.09.2018, rejected the refund of Rs. 12,77,92,894/- for the 1st period but sanctioned refund of Rs. 27,84,25,899/- for the 2nd period. The appellant challenged the denial of refund for the 1st period and the department also challenged the grant of refund for the 2nd period. The Commissioner (Appeals) disposed of the appeal filed by the appellant for the 1st period on 02.05.2019 with a direction for re-examination of the matter on certain aspects. However, the said order dated 02.05.2019 passed by the Commissioner (Appeals) to the extent refund was denied was set aside by the Tribunal on 14.08.2019 in Service Tax Appeal No. 51447 of 2019 filed by the appellant and it was held that the appellant would be entitled to refund of Rs. 12,77,92,894/- for the 1st period. The appeal filed by the Department for the 2nd period was rejected by the Commissioner (Appeals) by order dated 18.05.2020. The appellant had also filed a refund application for the 3rd period on 31.12.2018. This claim was rejected by the Assistant Commissioner, but the appeal filed by the appellant before the Commissioner (Appeals) was allowed by order dated 26.05.2020. The appellant submitted letters for implementation of the order passed by the Tribunal on 14.08.2019 and the order dated 26.05.2020 passed by the Commissioner (Appeals), but the refund was denied by order dated 10.12.2020 passed by the Assistant Commissioner and the appeal filed by the appellant against this order was rejected by the Commissioner (Appeals) by order dated 23.09.2021. The facts narrated above

relating to refund claims filed by the appellant for the three periods has given rise to the four Service Tax Appeals.

First Period

(ST No. 51853 of 2021)

6. Pursuant to the order dated 14.08.2019 of the Tribunal, the appellant filed a letter 05.09.2019, in regard to the 1st period, for implementation of the order. However, a show cause notice dated 05.05.2020 was issued to the appellant proposing to reject the refund for the 1st period on the ground that the refund application was barred by limitation and that the Tribunal had erred in holding that the duty free shops at the departure terminal of the Airport were located in a non-taxable area. On 31.07.2020, an addendum was issued in continuation of show cause notice dated 05.05.2020 for the 1st period stating that the refund was also barred by the principle of unjust enrichment. A reply was filed by the appellant to the show cause notice and the addendum that was issued, but by an order dated 10.12.2020 the refund was denied and the appeal filed by the appellant before the Commissioner (Appeals) was rejected by order dated 23.09.2020. This order has been assailed by the appellant in **Service Tax Appeal No. 51853 of 2021.**

Second Period

(ST No. 50902 of 2020)

7. Aggrieved by the order dated 06.09.2018 passed by the Assistant Commissioner sanctioning refund for the 2nd period, the Department filed an appeal on 19.12.2018 before the Commissioner (Appeals) on the sole ground that the services were provided to the appellant in a taxable territory. This appeal was dismissed by the

Commissioner (Appeals) by order dated 18.05.2020. The said order dated 18.05.2020 passed by the Commissioner (Appeals) has been assailed by the Department in **Service Tax Appeal No. 50902 of 2020**.

Third Period

(ST No. 50901 of 2020 and ST Appeal No. 51827 of 2021)

8. The appellant filed a refund application on 31.12.2018 for the 3rd period, but a show cause notice dated 01.02.2019 was issued to the appellant proposing to deny the refund on the grounds that the duty free shops were located in a taxable territory; the Tribunal had committed an error in the decision rendered by the Tribunal in **Flemingo**; and that an appeal had also been preferred by the Department before the Commissioner (Appeals) against the order dated 06.09.2018 granting refund to the appellant for the 2nd period.

9. The reply filed by the appellant to the show cause notice was not accepted, and by an order dated 27.06.2019 the Assistant Commissioner rejected the refund for the 3rd period on the ground that duty free shops were located in taxable territory and for coming to this conclusion, reliance was placed upon the order dated 02.05.2019 passed by the Commissioner (Appeals) for the 1st period for re-examination on certain aspects. This order dated 27.06.2019 was assailed by the appellant before the Commissioner (Appeals), who by order dated 26.05.2020, granted refund to the appellant for the 3rd period after examining the issues on limitation and unjust enrichment. It is against this order of the Commissioner (Appeals) that the Department has filed **Service Tax Appeal No. 50901 of 2020**.

10. Pursuant to the said order dated 26.05.2020 passed by the Commissioner (Appeals), the appellant submitted a letter dated 19.06.2020 for implementation of the order but a second show cause notice dated 04.08.2020 was issued to the appellant proposing to deny the refund on the ground of unjust enrichment. This show cause notice was followed by addendum/corrigendum seeking to add two more reasons for denying the refund claim namely, that the services were rendered in a taxable territory and that the claim was barred by limitation. The refund claim for the 3rd period was rejected by the Assistant Commissioner by an order dated 10.12.2020. The appellant, thereafter, preferred an appeal before the Commissioner (Appeals). The Commissioner (Appeals), by order dated 24.09.2021, upheld the order passed by the Assistant Commissioner to the extent it held that refund was barred by limitation and was hit by the principle of unjust enrichment, but agreed with the appellant that the services were rendered in a non-taxable territory and so service tax could not have been levied. It is against this order dated 10.12.2020 that **Service Tax Appeal No. 51827 of 2021** has been filed by the appellant.

11. Shri Tarun Gulati, learned senior counsel for the appellant assisted by Shri Sparsh Bhargava and Shri Sanjay Gulati made the following submissions:

(i) Issuance of the show cause notices for the 1st and 3rd period by the Assistant Commissioner to deny the refund are contrary to judicial discipline. With respect to refund for the 1st period, the Tribunal had ordered for refund to be paid and with respect to refund for 3rd period, the Commissioner

(Appeals) had ordered for refund with interest. The assessing officer, therefore, could not have denied the refund by issuing show cause notices on the grounds already settled by Appellate orders. In this connection, reliance has been placed on the following decisions:

(a) **Union of India** vs. **Kamalakshi Finance Corporation**[10];

(b) **East India Commerical Co. Ltd.** vs. **Collector of Customs, Calcutta**[11];

(c) **Khandwala Enterprises** vs. **Union of India**[12]; and

(d) **Nav Bharat Impex** vs. **Union of India**[13];

(ii) When on the same facts, the Tribunal and Commissioner (Appeals) had held that limitation and principle of unjust enrichment are inapplicable, it was not open to the authority to issue show cause notices on these issues and subsequently deny refund. Collateral proceedings could not have been initiated through issuance of the show cause notices. In this connection, reliance has been placed on the following decisions:

(a) **BSNL** vs. **Union of India**[14];

(b) **Amalgamated Coalfields Ltd.** vs. **Janapada Sabha Chhindwara**[15];

(c) **Radhasoami Satsang** vs. **CIT, Agra**[16]; and

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10. 1992 Supp (1) Supreme Court Cases 433
11. 1983 (13) E.L.T. 1342 (SC)
12. 2020 (371) E.L.T. 50 (Del.)
13. 2010 (255) E.L.T. 324 (Del.)
14. (2006) 3 Supreme Court Cases 1
15. 1963 Supp (1) SCR 172

(d) **Honda Siel Power Products Ltd.** vs. **Union of India**[17];

(iii) The Assistant Commissioner grossly erred in issuing addendum dated 31.07.2020 in continuation of show cause notice dated 05.05.2020 for the 1st period that refund was barred by principle of unjust enrichment and an addendum dated 23.11.2020 to the 2nd show cause notice for 3rd period dated 04.08.2020 that the refunds were barred by limitation, thereby expanding the scope of the show cause notice after replies were filed. In this connection, reliance has been placed on the following decisions:

(a) **Mahindra & Mahindra** vs. **CCE**[18];

(b) **Chawla Trading Co.** vs. **CC**[19];

(iv) The duty free shops are located beyond the taxable territory. The Department erroneously relied on the judgment of the Madhya Pradesh High Court in **Vasu Clothing Pvt. Ltd.** vs. **Union of India**[20] to hold that the duty free shops are located in taxable territory as this judgment would not be applicable to the facts of the present case. The Commissioner (Appeals), in the order dated 26.05.2020 for 3rd period, had distinguished **Vasu Clothing**;

(v) The limitation prescribed under section 11B of the Excise Act is inapplicable in the present appeals as

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16. (1992) 1 Supreme Court Cases 659
17. 2020 (372) E.L.T. 30 (All)
18. 2006 (196) E.L.T. 62 (Tri. Mum)
19. 2015 (330) E.L.T. 470 (Tri. Mum)
20. Writ Petition No. 17999 of 2018 decided on 17.12.2018

the amount paid by the appellant to DIAL cannot take the character of service tax, or swachh bharat cess and krishi kalyan cess. Thus, as the amount was collected without authority of law, the limitation prescribed under section 11B of Excise Act read with section 83 of the Finance Act would not be applicable in the present case. Such a view has been take in the own case of the appellant in the order dated 14.08.2019 passed by the Tribunal;

(vi) The refund is not hit by principle of unjust enrichment;

(vii) The show cause notice dated 05.05.2020 for the 1st period seeks to review the order dated 14.08.2019 passed by the Tribunal since despite a clear finding of the Tribunal that limitation would not be applicable, refund was denied by the show cause notice and the order on this ground;

(viii) The refund pursuant to order passed by the Tribunal cannot be denied since it cannot be said to be a case of 'erroneous refund' and it is the duty of the Department to comply with the decision of the Tribunal;

(ix) The show cause notices have wrongly construed the letters filed by the appellant for the implementation of the order as refund applications; and

(x) The show cause notice dated 04.08.2020 seeking to review the Appellate order dated 26.05.2020 is without jurisdiction and there is no infirmity in the

order dated 26.05.2020 passed by the Commissioner (Appeals) for granting refund for the 2nd period.

12. Shri Mihir Ranjan, learned special counsel appearing for the Department made the following submissions:

(i) The impugned orders, each dated 10.12.2020, passed by the Assistant Commissioner rejecting the refund claim for the 1st period and 3rd period do not suffer from any illegality. To claim refund, the appellant relied upon the decision of the Tribunal in **Flemingo**, but this decision of the Tribunal has been assailed by the Department before the Supreme Court and, therefore, the decision of the Tribunal has not attained finality;

(ii) Even otherwise, the legal position has now changed in view of the judgment of the Madhya Pradesh High Court in **Vasu Clothing**, though this judgment of the Madhya Pradesh High Court has also been assailed by the **Vasu Clothing** before the Supreme Court;

(iii) The decision of the Madhya Pradesh High Court in **Vasu Clothing** was not examined by the Tribunal in the decision rendered on 14.08.2019 as the Tribunal held that the issue therein had not been raised in the show cause notice dated 24.08.2018;

(iv) The proper procedure for claiming refund is prescribed under Circular dated 29.06.2022 issued by the Central Board of Indirect Taxes & Customs;

(v) Though the Statute does not prescribe issuance of the show cause notice while deciding the refund application, but in order to ensure compliance of the principles of natural justice, a show cause notice is issued and, therefore, addendum could have been issued; and

(vi) As the appellant had filed the refund claim under section 11B of the Excise Act, it was necessary for the adjudicating authority to examine the period of limitation and unjust enrichment.

13. The submissions advanced by the learned senior counsel for the appellant and the learned special counsel appearing for the Department have been considered.

14. The dispute in all the four Service Tax Appeals revolves around the refund applications filed by the appellant for the three periods. The appellant had paid service tax on the amount of rent and other charges for operating the duty free shops at the departure and arrival terminals of the Airport. The decision rendered by a Division Bench of the Tribunal in **Flemingo** on 28.09.2017 had led to the filing of the refund applications. Three refund applications were filed by the appellant for the 1st period and 2nd period on 31.08.2018 contending that in view of the decision of the Tribunal in **Flemingo**, the services provided to duty free shops which were located beyond the customs frontiers of India and not within the taxable territory, could not have been subjected to service tax and, therefore, the service tax collected was without any authority of law. It was further contended that since the burden of tax had been borne by the appellant, the same was liable to be refunded.

15. A show cause notice dated 24.08.2018 was issued by the Assistant Commissioner in regard to the refund claimed by the appellant through these three applications for the 1st and 2nd periods proposing to deny partial refund claim for the 1st period solely for the reason that it was barred by limitation under section 11B of the Excise Act. A reply was filed by the appellant, but by an order dated 06.09.2018 passed by the Assistant Commissioner, in view of the decision of the Tribunal in **Flemingo**, the refund claim for the 2nd period was allowed, but the refund claim for the 1st period was denied solely for the reason that it was barred by limitation under section 11B of the Excise Act. The Assistant Commissioner, however, decided the issue relating principle of unjust enrichment in favour of the appellant. The observations in connection with the principle of unjust enrichment are as follows:

> "46. In any case, the Applicant has produced a certificate from cost accountants M/s Amit Singhal & Associates whereby it is certified that the cost of such service tax charged by service providers has not been included in determining the selling price and therefore has not been passed onto the end customers. I have also verified that said data relied by cost accountant on sample basis and find that the Applicant has not passed on the cost of service tax on the input services under consideration, to its customers. Further I am in receipt of a letter dated 24.08.2018 by DIAL declaring that no refund claim of service tax (as received from the applicant) for the period Oct 2016-June 2017 shall be filed by them.
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> *****
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> Thus, the unjust enrichment provisions are not applicable to the present refund claims."

16. Regarding the quantum, the Assistant Commissioner observed as follows:

> "The applicant has submitted that the actual refund amount in respect of all the three claims comes to Rs. 40,62,18,793/-. On calculation, as per the annexure attached along with this order, the refundable amount comes to

	Service tax	KKC	SBC	Total
Airport service	29,54,860	1,05,531	1,05,531	31,65,922
Concessional fee	24,98,97,326	89,24,904	89,24,904	26,77,47,135
Marketing fee	86,69,043	3,09,609	3,09,609	92,88,261
Utility charges	17,27,869	61,710	61,710	18,51,289
Total	26,32,49,098	94,01,754	94,01,754	28,20,52,606

> Rs. 27,84,25,899/- (Service tax Rs. 26,32,49,098/- + SBC Rs. 94,01,754/- + KKC Rs. 94,01,754/- minu Rs. 36,26,707/- CENVAT already utilized) which is refundable whereas the balance refund claim of Rs. 12,77,92,894/- (Rs. 40,62,18,793/- minus Rs. 27,84,25,899/-) is liable to be rejected being barred by limitation as discussed in preceding paragraphs."

17. The Assistant Commissioner sanctioned the refund of Rs. 27,84,25,899/- for the 2nd period under section 11B of the Excise Act, but rejected the balance amount of refund claim of Rs. 12,77,92,894/- for the 1st period solely for the reason that it was barred by limitation.

18. Feeling aggrieved by that part of the order of the Assistant Commissioner that denied refund claim of Rs. 12,77,92,894/-, the appellant preferred an appeal before the Commissioner (Appeals) contending that any amount collected without authority of law has to be refunded to the appellant and, therefore, the limitation prescribed under section 11B of the Excise Act would not be applicable.

19. The Commissioner (Appeals), by order dated 02.02.2019, decided the appeal. The order of the Assistant Commissioner was set aside and the Appeal was disposed of in terms of the observations made in paragraphs 4 (ii) and (iii), which are reproduced below:-

> "4 *****
>
> (ii) I find that the appellant have been issued the Show Cause Notice dated 24.08.2018 (here-in-after referred to as "SCN") proposing the denial of partial refund claim. **On perusal of the show cause notice, I find that the same has been issued on the basis that the sale at duty free shops by the appellant qualifies as export and accordingly, the period of limitation as exists in respect of export related cases would be applicable. However, this fact has not been examined in the impugned order as to whether or not the sales by the appellant at the duty free shops qualify as export. Thus, the very basis to issue the show cause notice has not been examined in the impugned order. To this extent, the same is a non-speaking order inasmuch as the Adjudicating Authority must have examined the issue on the basis of which the show cause notice has been issued to the appellant.** I find that the Chandna Impex vs CCU 2011 (269) ELT 433 (SC), the Hon'ble Supreme Court has held that "Statutory appeal dismissed in limine by non-speaking order by High Court, as submitted High Court should have examined each question formulated with reference to material considered by Tribunal and given its reasons." **Thus, it must have been examined as to whether or not the supply by the appellant qualifies as export of goods out of India. Lacking the examination of this aspect, the impugned order suffers infirmity and this aspect needs to be re-examined by the Adjudicating Authority.**
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> (iii) I also find that the refund has been granted to the appellant following the judicial discipline applying the ratio of the judgment in CST vs. Flemingo Duty

> Free Shops Pvt. Ltd. (2018 (8) GSTL 181 Tri-Mum). **Though at the time of passing of impugned order, the Adjudicating Authority is correct in holding that this judgment has a binding precedent to be followed, now the legal position has changed in view of passing of recent judgment by Hon'ble High Court of Madhya Pradesh in Vasu Clothing Vs UOI (2018) 100 Taxmann.com 451 (Madhya Pradesh). Deliberating upon the issue as to whether or not the duty free shops are located beyond the Taxable territory, the Hon'ble High Court has clearly held that such duty free shops are located within Taxable territory. The legal position on this issue has undergone a change. However, since this judgment was not available to the Adjudicating Authority at the time of passing of impugned order, the instant case needs to be remitted back to the Adjudicating Authority to examine the refund claim afresh also taking into account the judgment in Vasu Clothing (supra)**. He shall pass the order as per (para (ii) & (iii) above following the law of natural justice.
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> In view of discussion, analysis and judgments cited above, the impugned order is quashed and the appeal is disposed of as per para 4 (ii) & (iii) above."
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> **(emphasis supplied)**

20. All that was required to be examined by the Commissioner (Appeals) was whether period of limitation prescribed in section 11B of the Excise Act would be applicable, but the Commissioner (Appeals) remanded the matter to the Assistant Commissioner to examine whether or not the supply by the appellant would qualify as export of goods, even after noticing the decision of the Tribunal in **Flemingo** that had held that it would not qualify as export of goods.

21. The said order dated 02.02.2019 passed by the Commissioner (Appeals) was assailed by the appellant before the Tribunal in Service Tax Appeal No. 51447 of 2019 on the ground that not only the said order travelled beyond the charge contained in the show cause notice but limitation would also not be applicable to refund claims submitted by the appellant for the reason that the amount had been collected without authority of law. The Tribunal, in the decision rendered on 14.08.2019, set aside the order dated 02.05.2019 passed by the Commissioner (Appeals) and allowed the appeal by holding that the appellant would clearly be entitled to refund of the amount of Rs. 12,77,92,894/- that was denied to the appellant by the Assistant Commissioner. The relevant portion of the order passed by the Tribunal is reproduced below:

> "15. It was imperative for the Commissioner to have confined himself to the issue raised in the show cause notice but what transpires from the Order passed by the Commissioner is that the Commissioner instead of examining this limited issue relating to limitation went beyond the show cause notice and in fact went to the extent of observing that it was necessary for the adjudicating authority to have examined whether the supply by the Appellant qualifies "export of goods". As noticed above, the show cause notice did not call upon the Appellant to submit a reply on this issue and in fact proceeded on the footing that the sale of goods by a duty free shop to outbound international passengers was "export of goods" *****"

22. After considering the decision of the Delhi High Court in **Alar Infrastructure Pvt. Ltd.** vs. **Commissioner of Central Excise, Delhi-I**[21], the Tribunal observed as follows:

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21. 2015 (40) S.T.R. 1066 (Del. HC)

> "25. The Delhi High Court clearly observed that if the services rendered by the Appellant therein were not liable to the Service Tax at all, the question of processing the refund application of the appellant with reference to section 11B of the Excise Act would not arise and for this propose reliance was placed by the High Court on an earlier judgment of the Delhi High Court in Hind Agro Industries Ltd. The Delhi High Court also noticed the decision of the Supreme Court in Mafatlal Industries Ltd. v/s Union of India [1997 (89) ELT 247 (SC)]."

23. The Tribunal also referred to the decision of the Delhi High Court in **National Institute of Public Finance and Policy** vs. **Commissioner of Service Tax**[22] and the Karnataka High Court in **Commissioner of Central Excise (Appeals), Bangalore** vs. **KVR Construction**[23] and observed as follows:

> "26. The Delhi High Court specifically in **National Institute of Public Finance and Policy** accepted the view of the assessee that when the amount was never payable as there was no levy at all, the question of denying the refund did not arise and that the general principal of limitation will be applicable from the date of discovery of mistaken payment.
>
> 27. The Karnataka High Court in **KVR Construction** relied upon the decision of the Delhi High Court in **Hind Agro Industries** and held that section 11B of the Excise Act refers to claim for refund of excise only and does not refer to any other amount collected without authority of law. Relevant portion of the order is reproduced below:-
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> > "***** When once there is lack of authority to demand "service tax" from the respondent company, the department lacks authority to levy and collect such amount. Therefore, it would go beyond their purview to collect such amount. When once there is lack of authority to collect such service tax

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22. Order dated 23.08.2018 in SERTA 13/2018
23. 2012 (26) S.T.R. 195 (Kar.)

> by the appellant, it would not give them the authority to retain the amount paid by the petitioner, which was initially not payable by them. Therefore, mere nomenclature will not be an embargo on the right of the petitioner to demand refund of payment made by them under mistaken notion."

24. Thereafter, the Tribunal observed as follows:

> "28. Learned Authorized Representative of the Department, however, placed reliance upon the decision of the Madhya Pradesh High Court in **Vasu Clothing Pvt. Ltd.** The Court held that supply made to duty free shop in the form of services by DIAL would not qualify as export of goods.
>
> 29. **As noticed above this was not even the allegation in the show cause notice and in fact the show cause notice proceeded on the footing that the Appellant qualified as an exporter of goods. In the earlier paragraphs of this order it has been held that the adjudicating authority or the appellate authority cannot go beyond the allegations contained in the show cause notice. It would, therefore, not be necessary to consider the submission of the learned Authorized Representative of the Department.**
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> 30. **The impugned order dated 2 May, 2019 is, accordingly, set aside and the Appeal is allowed. The Appellant would be clearly entitled to refund of the amount of Rs. 12,77,92,894/- that was denied to the Appellant by the Assistant Commissioner.**"
>
> **(emphasis supplied)**

25. At this stage, it also needs to be emphasised that in regard to the refund allowed by the Assistant Commissioner for the 2nd period, the Department had filed an appeal before the Commissioner (Appeals). By an order dated 18.05.2020, the Commissioner

(Appeals) dismissed the appeal after placing reliance upon the decision of the Tribunal rendered on 14.08.2019 in regard to the 1st period and observed as follows:

> "**The Hon'ble CESTAT has clearly held that the amount paid by the respondent cannot be retained by the Revenue without any authority of law. Thus, the CESTAT has ratified the findings recorded by the Adjudicating Authority wherein it has been held that no service tax was payable by the respondent in respect of the duty free shops and the collection of such service tax is not authorized in the law. Moreover, the Hon'ble CESTAT has held that 'the appellant would be clearly entitled to refund'.** The use of word clearly shows that the respondent fulfill all the requirements of Section 11B of the Central Excise Act, 1944 to get the refund claim. It is also noted that sanction of refund claim in respect of service tax beyond limitation period also involves sanction of refund claim of service tax that is within limitation period."
>
> **(emphasis supplied)**

26. The Department had also placed reliance upon the judgment of the Supreme Court in **Aban Loyd Offshore Limited** vs. **Union of India**[24] and the decision of the Madhya Pradesh High Court in **Vasu Clothing**. The Commissioner (Appeals) held that these two decisions would not come to the aid of the Department in view of the decision rendered by the Tribunal on 26.10.2018 in Application Nos. ST/ROM/85493, 85498 to 85504/2018 and the decision of the Tribunal rendered on 14.08.2019 in Service Tax Appeal No. 51447 of 2019. The order dated 26.10.2018 passed by the Tribunal on the rectification of mistake application is as follows:

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24. 2008 (227) E.L.T. 24 (S.C.)

> "7. Taxable Territory is a semantic contrivance of Finance Act, 1994 consequent upon the paradigm shift to 'negative list' an imperative in the context of an intangible levy on that which, a metaphorical palimpsest, is sensible only in the recipient till then the tax laws to the country did not even require this crutch, It is, therefore, inappropriate on the part of learned Authorised representative to suggest that the Hon'ble Supreme Court in Aban Lloyd Chiles Offshore Ltd. while resolving a dispute on the geographical jurisdiction for levy of tax on tangible goods, did draw the circle within which 'taxable territory' would lie. For the purpose of Finance Act, 1994, with effect from 1st July, 2012, 'taxable territory' has a connotation and 'India' has a distinct definition; the equating of the two may well suit the applicant-Commissioner but inappropriate citing would not advance that cause."

27. The Department had also placed reliance on the decision of the Supreme Court in **Hotel Ashoka** vs. **Assistant Commissioner of Commercial Taxes**[25], but the Commissioner (Appeals) held that this judgment would support the case of the appellant.

28. The Commissioner (Appeals) relied upon the decision of the Bombay High Court in **A-1 Cuisines Pvt. Ltd.** vs. **Union of India**[26], which referred to the decision taken by the Government of India on 31.08.2018 in a Revision relating to **Aarish Altaf Tinwala** to hold that the transaction effected at duty free shops at the arrival or departure terminals of International Airports in India may have taken place within the geographical territory of India, but for the purposes of levy of customs duty or any other tax, the area of duty free shops shall be deemed to be an area beyond the customs frontiers of India.

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25. 2012 (276) E.L.T. 433 (SC)
26. 2019 (22) G.S.T.L. 326 (Bom.)

29. The Central Government relied upon the judgment of the Supreme Court in **Hotel Ashoka** and the relevant portion of the decision of the Central Government is as follows:

> "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."

30. The observations made by the Supreme Court in **Hotel Ashoka** are as follows:

> "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."**
>
> **(emphasis supplied)**

31. After referring to the aforesaid decision of the Government of India and the decision of the Supreme Court in **Hotel Ashoka**, the Bombay High Court, in **A-1 Cuisine**, held as follows:

> "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. ***** 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."
>
> **(emphasis supplied)**

32. It needs to be noted that the Special Leave Petition filed by the Department against the aforesaid judgment of the Bombay High Court was dismissed on 14.12.2018.

33. The Department has filed Service Tax Appeal No. 50902 of 2020 to assail the order dated 18.05.2020 passed by the Commissioner (Appeals).

34. Thus, in view of the decision of the Tribunal rendered on 14.08.2019, the appellant was clearly entitled to the refund of the amount claimed for the 1st period and in view of the order dated 06.09.2018 passed by the Assistant Commissioner and the order dated 18.05.2020 passed by the Commissioner (Appeals), the appellant was clearly entitled to refund of the amount claimed for the 2nd period. The Commissioner (Appeals) in the said order had also placed reliance upon the decision of the Tribunal.

35. It was for implementation of the order dated 14.08.2019 passed by the Tribunal in regard to the 1st period that the appellant submitted a communication dated 05.09.2019 in connection with of the refund application dated 31.01.2018. The relevant portion of the communication dated 05.09.2019 sent by the appellant is reproduced below:

"Subject: REFUND OF SERVICE TAX PAID ON LICENSE FEES.

Ref: REFUND APPLICATIONS DATED 31.01.2018.

Dear Sir,

Please refer to the captioned refund applications dated 31.01.2018 whereby Delhi Duty Free Services Pvt. Ltd. ("us/we") sought refund of service tax paid on license fees paid to Delhi International Airport Ltd. The details of the said refund applications are as below:

S. No.	Period	Amount
1	October 2016 to December 2016	Rs. 12,77,92,894/-
2.	January 2017 to March 2017	Rs. 14,28,46,179/-
3.	April 2017 to June 2017	Rs. 12,84,96,629/-

While we were granted refund of Rs. 27,84,25,899/- for the period January 2017 to June 2017 by your order dated 06.09.2018, refund of Rs. 12,77,92,894/- pertaining to the period October 2016 to December 2016 was rejected on the ground of limitation. Subsequently, the Ld. Commissioner (Appeals) also rejected our appeal and directed the Adjudication Officer to re-examine the matter against which we preferred an appeal before the Hon'ble CESTAT, New Delhi being Appeal No. ST/51447/2019.

It may be noted that vide order dated 14.08.2019 in Appeal No. ST/51447/2019, the Hon'ble CESTAT, New Delhi is pleased to allow our appeal and has held that the refund of service tax amounting to Rs. 12,77,92,894/- is payable to us. A copy of the order dated 14.08.2019 is enclosed as Annexure 1 for your reference.

Thus, considering the decision of Hon'ble CESTAT, New Delhi, we request you to please grant us the refund of service tax amounting to Rs. 12,77,92,894/- along with interest."

(emphasis supplied)

36. Once the Tribunal had held in the decision rendered on 14.08.2019 that the appellant would be entitled to refund of Rs. 12,77,92,894/- that was denied to the appellant by the Assistant Commissioner since the issue of limitation would not arise in the matter, it was the bounden duty of the Assistant Commissioner to grant the refund, unless the order passed the Tribunal was set aside, but what transpires from the record is that Shri Subhash Chandra, Assistant Commissioner, Division-Vasant Kunj, after taking note of the decision rendered by the Tribunal on 14.08.2019, issued a show cause notice dated 05.05.2020 to the appellant proposing to deny the refund on the ground of limitation and on the ground that the duty free shops were situated in a taxable territory. A perusal of this show cause notice leaves no manner of doubt that the officer proceeded to examinate the matter as if he was sitting in appeal over the decision of the Tribunal. This would be apparent from paragraph 13 of the show cause notice which is reproduced below:

> "13. **On examination, it has been found that <u>Hon'ble CESTAT has cited various case laws and without giving any finding inter-alia held</u> that, if services rendered by the applicant were not liable to service tax, the question of processing of refund claim under Section 11B of the Central Excise Act, 1944 would not arise and** accordingly, the Claimant vide letter dated 05.09.2019 has filed refund claim of Rs. 12,77,92,894/- on the basis of Hon'ble CESTAT's Final Order No. 51164/2019 dt. 14.08.2019, where Hon'ble CESTAT has allowed the appeal in favour of Claimant."
>
> **(emphasis supplied)**

37. After further analysis, which was absolutely unnecessary, the Assistant Commissioner not only observed that the period of

limitation contemplated in section 11B of the Excise Act would apply to the present refund claims but also proceeded to examine whether the decision of the Tribunal in **Flemingo** that held that the duty free shops were not situated in a taxable territory was correct or not and after observing that the Tribunal erred in holding that the duty free shops were situated in a non-taxable area, called upon the appellant to show cause as to why refund claim for Rs. 12,77,92,894/- for the 1st period should not be rejected. The relevant portions of the show cause notice are reproduced below:

> "23. ***** In view of the above observation of the Hon'ble CESTAT, it appears that if the department takes a view that duty free shop and the bonded warehouse is beyond the Customs frontier of India and is outside India (contrary to the Chapter-IX-Warehousing provisions) then the department cannot charge Service Tax on the rent paid by the duty free shops. **However, the fact remains that the application of definition of territory under Customs Act and Finance Act, were not an issue in dispute before the Hon'ble Tribunal and Hon'ble Tribunal's observations on this issue appears to be beyond the scope of the appeal. <u>It further appears that the observation of Hon'ble CESTAT is not correct</u> in as much as Section 2(27) of Customs Act 1962 defines India as, India "includes the territorial waters of India. Sub-Section (27) of Section 65B Finance Act, 1994 defines "India"** as, *****
>
> *****
>
> 24. ***** The issue of taxable territory in relation to Customs and Central Excise duties was clarified by Hon'ble Supreme Court in the matter of Aban Lyod Chiles Offshore Ltd. Vs. Union of India, 2008(227) ELT 24 (S.C.) ***** **<u>Therefore, it is respectfully submitted that the Hon'ble CESTAT has erred in holding/describing the duty free shops at departure module of International</u>**

> **<u>Airport as in non taxable territory, which is undoubtedly within the taxable territory of India</u> in view of the provisions of Customs Act, 1962, Finance Act, 1994 and also the Apex Court Judgment in the case of Aban Lyod Chiles Offshore Ltd.**
>
> **Hence, M/s. Delhi Duty Free Services Pvt. Ltd., is situated well within the taxable territory.**"
>
> **(emphasis supplied)**

38. The appellant filed a reply dated 05.06.2020 before the Assistant Commissioner pointing out that the show cause notice had been issued against the principles of judicial discipline and was contemptuous. It was also pointed out by the appellant that the show cause notice seeks to review the order passed by the Tribunal and was, therefore, without jurisdiction and that the refund could not have been denied to the appellant in view of the decision of the Tribunal. The appellant also pointed out that in any view of the matter, supply of services to duty free shops took place outside the taxable territory and that the limitation prescribed under section 11B of the Excise Act would not be applicable as the amount was collected without authority of law.

39. After the issuance of the show cause notice, an addendum/corrigendum dated 23.07.2020 was issued by the Assistant Commissioner and it was stated that the claim of the appellant also appeared to be hit by the bar of unjust enrichment as the incidence of duty had been passed on to the customers at the time of clearance of the goods. The appellant also filed a reply to the addendum.

40. This show cause notice dated 05.05.2020 was adjudicated upon by Shri Subhash Chandra, Assistant Commissioner, Division-Vasant Kunj by order dated 07.12.2020 and the refund claim of Rs. 12,77,92,894/- for the 1st period was rejected.

41. In the first instance, the Assistant Commissioner proceeded to examine whether duty free shops were situated within the taxable territory and after referring to the decision of the Madhya Pradesh High Court in **Vasu Clothing** held as follows:

> "16.19 In view of the foregoing facts and discussion I find that the duty free shops at the Customs area are situated in taxable territory and liable to service tax. Accordingly, the service tax charged by DIAL from DDF and paid to the government was under proper authority of Law and therefore the provisions of Section 11B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 is rightly applicable in such cases if any refund arises. Accordingly, I find that impugned refund claim is not admissible."

42. As regards the limitation for filing the refund claim, the Assistant Commissioner observed as follows:

> "17.3 I find that in the instant case the appellant himself filed the claim under Section 11B of the Act and in view of discussion held in forgoing paras, the provision of Section 11B, in whole are applicable for processing of the refund claim including provisions of relevant date provided for filing of refund claim. Further Hon'ble Supreme Court has held in the matter of Mafatlal Vs Union of India that in the case of taxes collected without authority of law or levy has been held unconstitutional by the Courts, the tax payer will have file the civil suit for recovery of such unlawful or unconstitutional of tax. Accordingly, I find that if claim is filed under the provisions of Section 11B of the Central Excise Act, the said Section shall ipso facto be applicable in the

> processing of the refund claim. The authority could not go beyond the provisions of Section 11B while deciding the claim and therefore I find that the claim has been hit by bar of limitation, accordingly inadmissible on this count also."

43. As regards unjust enrichment, the Assistant Commissioner held that the principle of unjust enrichment would also be applicable.

44. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals). The appeal was dismissed by order dated 10.12.2020. This order of the Commissioner (Appeals) also decided the appeal filed by the appellant against the order dated 10.12.2020 passed by the Assistant Commissioner rejecting the refund claim for the 3rd period. In regard to the issue as to whether the shops were situated within the taxable area or not, the Commissioner (Appeals) decided the issue in favour of the appellant and held that the supply of services to the duty free shops took place outside India and, therefore, the service tax paid by the appellant was refundable. However, the Commissioner (Appeals) held that refund had been claimed beyond the limitation period contemplated under section 11B of the Excise Act and the principle of unjust enrichment would also be applicable.

45. The first issue that would arise for consideration in these appeals is as to whether pursuant to the letters submitted by the appellant for ensuring compliance of the order dated 14.08.2019 passed by the Tribunal on 14.08.2019 for the 1st period and the order passed by the Commissioner (Appeals) on 26.05.2021 for the 3rd period, the Assistant Commissioner could have treated these letters as fresh refund applications, so as to confer power upon him to issue show cause notices to the appellant for denying the refund.

46. The Assistant Commissioner completely fell in error in treating the communication dated 05.09.2019 submitted by the appellant for compliance of the order dated 14.08.2019 passed by the Tribunal as a fresh application filed by the appellant for refund of Rs. 12,77,92,894/-. As would be seen, the appellant had made it clear in the communication dated 05.09.2019 that it was in the context of the refund application dated 31.01.2018 and the prayer made was to grant refund in view of the decision rendered by the Tribunal on 14.08.2019. Thus, the proceeding initiated by the Assistant Commissioner by treating the said communication as a fresh refund application was without jurisdiction and consequently all orders passed thereon are without jurisdiction and liable to be set aside. Likewise, the proceeding initiated by the Assistant Commissioner by treating the letter dated 19.06.2020 submitted by the appellant for implementation of the order dated 26.05.2020 passed by the Commissioner (Appeals) as a fresh application for refund would be without jurisdiction and all orders passed thereon are liable to be set aside. The Assistant Commissioner, unless the decisions of the Tribunal and the Commissioner (Appeals) had been set aside, had necessarily to comply with the directions issued by the Tribunal and the Commissioner (Appeals) and grant refund to the appellant for the 1st period and 2nd period.

47. Secondly, a perusal of the show cause notices leaves no manner of doubt that the Assistant Commissioner sat in appeal over the decisions rendered by the Tribunal and the Commissioner (Appeals). In regard to the decision rendered on 14.08.2019, the Assistant Commissioner commented that the Tribunal **"has cited various case**

laws and without giving any findings inter alia held that if services rendered by the applicant were not liable to service tax the question of processing of refund claim under section 11B of the Central Excise Act, 1944 would not arise" and ultimately observed that **"the present refund claims are to be scrutinized only under section 11B of the Central Excise Act, 1944, and, therefore, the period of limitation mentioned in the section would apply the present refund claims"**. The Assistant Commissioner also stated that the observation made by the Tribunal in **Flemingo** were not correct and the Tribunal **"erred in holding/describing the duty free shops at the departure module of International Airport as a non-taxable territory, which is undoubtedly within the taxable territory of India"**.

48. In the decision rendered on 14.08.2019, the Tribunal had held that the refund claim for the 1st period could not have been denied as being barred by limitation for the reason that service tax had been collected without authority of law and so the provisions of section 11B of the Excise Act would not be applicable. It is for this reason that the Tribunal held that the appellant would clearly be entitled to the refund of the amount claimed. It needs to be noticed that the show cause notice dated 24.08.2018 was issued to the appellant proposing to deny the refund for the 1st period only on the ground that it was barred by limitation and it is this issue that was decided in favour of the appellant by the Tribunal in the decision rendered on 14.08.2019. The Assistant Commissioner had, therefore, simply to process the refund of the amount claimed by the appellant. However, the Assistant Commissioner assumed to himself an appellate jurisdiction

over the Tribunal by concluding that the two decisions rendered by the Tribunal in **Flemingo** on 28.09.2017 and in the own case of the appellant on 14.08.2019 had been incorrectly decided. In regard to the decision rendered by the Tribunal on 14.08.2019, the Assistant Commissioner observed that the Tribunal relied upon various case laws to hold that the services rendered by the appellant were not liable to service tax without giving any finding on this issue. In regard to the decision rendered by the Tribunal in **Flemingo** on 28.09.2017, the Assistant Commissioner observed that the definition of 'territory' under the Customs Act and the Finance Act was not even an issue before the Tribunal, but yet the Tribunal examined it and so it travelled beyond the scope of the appeal. Not only this, the Assistant Commissioner further observed that the Tribunal was not correct in taking such a view and in fact erred in holding/describing the duty free shops at the departure terminal of the International Airport as being within a non-taxable territory, though, it is undoubtedly within the taxable territory of India.

49. The Commissioner (Appeals) agreed with the appellant that the duty free shops were situated beyond the customs frontier of India and, therefore, the service tax paid by the appellant was refundable, but decided the issue of limitation and the issue of unjust enrichment against the appellant. The Commissioner (Appeals) was bound by the decision of the Tribunal rendered on 14.08.2019 wherein it had been held that the issue of the limitation would not arise in the present matter as tax had been collected without authority. It was for implementation of the order passed by the Tribunal that an application had been filed. Thus, under no circumstances the

Commissioner (Appeals) could have taken upon himself the task of deciding the issue of limitation or unjust enrichment.

50. One course open to the Tribunal, at this stage, is to set aside the order dated 10.12.2020 passed by the Assistant Commissioner and the order dated 23.09.2021 passed by the Commissioner (Appeals) for the reasons stated above, but more importantly, the issue that calls for an examination is as to whether the Assistant Commissioner and the Commissioner (Appeals) can be permitted to overreach the orders passed by the Tribunal.

51. So long as the decision of the Tribunal had not been set aside by the High Court or the Supreme Court, they had precedential value so far as the Assistant Commissioner and the Commissioner (Appeals) are concerned. The aforesaid observations made by the Assistant Commissioner, including that the Tribunal committed an error in the two decisions, speak volumes about non-observance of judicial propriety and are contemptuous in nature. The Assistant Commissioner and the Commissioner (Appeals) were bound to follow the order of the Tribunal.

52. In this connection, it would be pertinent to refer to the decision of Supreme Court in **The Bhopal Sugar Industries Ltd.** vs. **the Income-Tax Officer, Bhopal**[27]. The Supreme Court pointed out that it would result in chaos in the administration of justice if a subordinate Tribunal refuses to carry out directions given to it by a superior Tribunal. In fact, this would be destructive of one of the basic principles of administration of justice. The observations of the Supreme Court are as follows:

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27. AIR 1961 SC 182

"By that order the respondent virtually refused to carry out the directions which a superior tribunal had given to him in exercise of its appellate powers in respect of an order of assessment made by him. Such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on a hierarchy of courts. **If a subordinate tribunal refuses to carry out directions given to it by a superior tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice and we have indeed found it very difficult to appreciate the process of reasoning by which the learned Judicial Commissioner while roundly condemning the respondent for refusing to carry out the directions of the superior tribunal, yet held that no manifest injustice resulted from such refusal.**

It must be remembered that the order of the Tribunal dated April 22, 1954, was not under challenge before the Judicial Commissioner. That order had become final and binding on the parties, and the respondent could not question it in any way. As a matter of fact the Commissioner of Income-tax had made an application for a reference, which application was subsequently withdrawn. The Judicial Commissioner was not sitting in appeal over the Tribunal and we do not think that in the circumstances of this case it was open to him to say that the order of the Tribunal was wrong and, therefore, there was no injustice in disregarding that order. **As we have said earlier, such view is destructive of one of the basic principles of the administration of justice.** In fairness to him it must be stated that learned counsel for the respondent did not attempt to support the judgment of the Judicial Commissioner on the ground that no manifest injustice resulted from the refusal of the respondent to carry out the directions of a superior tribunal. He conceded that even if the order of the Tribunal was wrong, a subordinate and inferior

> tribunal could not disregard it; he readily recognised the sanctity and importance of the basic principle that a subordinate tribunal must carry out the directions of a superior tribunal."
>
> **(emphasis supplied)**

53. This principle was also laid down by Supreme Court in **Dharma Chand Jain** vs. **The State of Bihar**[28] and the observations are:

> "The State Government being a subordinate authority in the matter of grant of a mining lease, was obliged under the law to carry out the orders of the Central Government as indicated above. But the State Government declined to do so on the ground that it had laid down a policy that the mining leases in respect of the area should be given only to those who were prepared to set up a cement factory. It was clearly not open to the State Government to decline to carry out the orders of the Central government on this ground, particularly because the Central Government was a tribunal superior to the State Government……."

54. In **Smt. Kaushalya Devi Bogra and others** vs. **The Land Acquisition Officer and another** [29], the Supreme Court also observed that the direction of the Appellate Court is binding on the courts subordinate thereto and that judicial discipline requires and decorum known to law warrants that appellate directions should be taken as binding and followed. In this connection, the Supreme Court referred to the observations made by the House of Lords and the relevant portion of the judgment of the Supreme Court is reproduced below:

> **"The direction of the appellate court is certainly binding on the courts subordinate thereto.** That apart, in view of the provisions of Article 41 of the Constitution, all courts in India

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28. AIR 1976 SC 1433
29. AIR 1984 SC 892

are bound to follow the decisions of this Court. **Judicial discipline requires and decorum known to law warrants that appellate directions should be taken as binding and followed.** It is appropriate to usefully recall certain observations of the House of Lords in Broom v. Cassell & Co.(1) Therein **Lord Hailsham**, L. C. observed:

> "The fact is, and I hope it will never be necessary to say so again, that in the hierarchical system of courts which exist in this country, **it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tier."**

Lord Reid added:

> "It seems to me obvious that the Court of Appeal failed to understand Lord Delvin's speech but whether they did or not, I would have accepted them to know that they had no power to give any such direction and to realise the impossible position in which they were seeking to put those judges in advising or directing them to disregard a decision of this House."

Lord Diplock observed at p. 874 of the Reports:

> "It is inevitable in a hierarchical system of courts that there are decisions of the Supreme appellate tribunal which do not attract the unanimous approval of all members of the judiciary. When I sat in the Court of Appeal, I sometimes thought the House of Lords was wrong in over ruling me. Even since that time there have been occasions, of which the instant appeal is one, when alone or in company. I have dissented from a decision of the majority of this House. **But the judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted.**"

(emphasis supplied)

55. In this connection it will also be appropriate to refer to the decision of the Supreme Court in **Kamlakshi Finance**. The order passed by the Assistant Collector not only ignored the order of the

Collector (Appeals) remanding the matter, but also distinguished the decision of the Tribunal by observing that the decision of the Tribunal had not been agreed to by the Department as an appeal had been filed in the Supreme Court. The assessee filed a writ petition in the Bombay High Court to challenge the said order of the Assistant Collector. The High Court not only quashed the order passed by the Assistant Collector but also directed the Department to allocate the matter to a competent officer for passing a proper order. It is against this decision of the Bombay High Court that the Union of India preferred an appeal before the Supreme Court. The Supreme Court remarked that as the Assistant Commissioner had not followed the decision of the Tribunal merely because an appeal had been filed by the Department before the Supreme Court, the High Court had rightly criticized the conduct of the Assistant Collector since it resulted in harassment to the assessee caused by the failure to give effect to the order passed by the Tribunal. The Supreme Court also observed that the order of the Tribunal is binding upon the Assistant Collectors who functions under the jurisdiction of the Tribunal and that the principles of judicial discipline require that the orders of higher appellate authorities are unreservedly followed by the subordinate authorities. The relevant portion of the order of the Supreme Court is reproduced below:

> "6. ***** But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in reaching in their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. **The High Court has, in our view,**

rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate heirarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities; **The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.** The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.

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8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assesses-public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. **The observations of the High Court should be kept in mind in future and the utmost regard should be paid by the adjudicating authorities and the appellate**

> **authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them.**"
>
> **(emphasis supplied)**

56. The aforesaid decisions of the Supreme Court have been referred to by the Supreme Court in **Commissioner of Income Tax** vs. **Ralson Industries Ltd.**[30] and it has been observed that when an order is passed by a higher authority, the lower authority is bound, keeping in view the principles of judicial discipline.

57. What is also important to notice in the present case is that while adjudicating the first show cause notice dated 24.08.2018 that was issued to the appellant when the refund application was filed, the Assistant Commissioner had, in the order dated 06.09.2018, after reminding himself of the observations made by the Supreme Court in **Kamalakshi Finance** about maintaining judicial discipline, followed the decision of the Tribunal in **Flemingo** to hold that the appellant would be entitled for refund of service tax as the duty free shops were located beyond the taxable territory and it is only on the ground of limitation that the claim was rejected. In fact, with regard to the principle of unjust enrichment, the Assistant Commissioner also found as a fact that the appellant had produced a certificate from the cost accountant certifying that the service tax charged had not been included in determining the selling price and, therefore, the burden of tax had not passed on to the customers. The Assistant Commissioner also verified the data relied upon by the cost accountant on a sample basis to hold that the assessee had not passed on the cost of service tax to the customers. The Assistant Commissioner also noticed that

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30. (2007) 2 SCC 326

DIAL had submitted a letter dated 24.08.2018 declaring that it had not claimed refund of service tax. The finding of the Assistant Commissioner on the issue of limitation was set aside by the Tribunal in the decision rendered on 14.08.2019 holding that limitation would not be applicable in a case where tax was realised without authority of law and so the appellant was entitled to refund. Thus, the show cause notice that was again issued by a different Assistant Commissioner on 05.05.2020 when the appellant filed an application for implementing the said decision of the Tribunal, seeks to not only nullify the decision of the Tribunal but also seeks to re-open the issues that had earlier settled by the Assistant Commissioner.

58. What needs to be emphasized at this stage is that two orders had been passed by the Commissioner (Appeals). The order dated 18.05.2020 is with regard to the claim made for the 2nd period while the order dated 26.05.2020 is with regard to the claim made for the 3rd period. In both these orders the Commissioner (Appeals) decided the issues in favour of the appellant. In the former order dated 18.05.2020, the Commissioner (Appeals) emphasized that the appellant was entitled to refund because of the order dated 14.08.2019 passed by the Tribunal and all the contentions advanced on behalf of the Department had been considered and rejected. In the latter order dated 26.05.2020, the Commissioner (Appeals) noted that he was bound by the order dated 14.08.2019 passed by the Tribunal and also referred to the decision of the Supreme Court in **Kamalakshi Finance** to observe that he had to maintain judicial discipline. The relevant portion of the order passed by the Commissioner (Appeals) is reproduced below:

"(c) Coming to the present appeal of appellant, the Adjudicating Authority has rejected the refund claim relying mainly (I) upon the OIA dated 02.05.2019 and (II) the Revenue appeal mentioned in para no. 4(i)(b)(2)(i) above. Since, both the appeals have now been decided; the rejection of refund claim on these grounds cannot be sustained.

(ii) **The Hon'ble CESTAT judgment dated 14.08.2019 has now become a binding precedent. The relevant portion of the judgment dated 14.08.2019 (which allowed the appeal) has held that the appellant are clearly entitled for refund.**

(iii) ***** Further, the Hon'ble CESTAT has decided the matter after hearing at length as well as examining the various submission & documentary evidences submitted by the appellant and the Revenue both including the OIO dated 06.09.2018 & OIA dated 02.05.2019. As such, after due examination of the facts, the Hon'ble CESTAT has arrived at the conclusion that the appellant are clearly entitled to the refund claim under the law. **The judgment dated 14.08.2019 passed by the Hon'ble CESTAT needs to be followed invariably since the judgments by the Jurisdictional CESTAT are binding on the Commissioner (Appeals) within their Jurisdiction as held in Union of India vs. Kamlakshi Finance Corporation Ltd. [1991 (55) E.L.T. 433 (S.C.)]. As such, the judgment dated 14.08.2019 has a binding precedent and needs to be followed in view of settled principle of judicial discipline."**

(emphasis supplied)

59. The Commissioner (Appeals) noted that the decision of the Madhya Pradesh High Court in **Vasu Clothing** would not be relevant as the said decision had been considered by the Tribunal in its decision rendered on 14.08.2019. The Commissioner (Appeals) also placed reliance upon the decision of the Tribunal in **Flemingo**, the

decision of the Supreme Court in **Hotel Ashoka** and the decision of Bombay High Court in **A-1 Cuisine** and ultimately concluded as follows:

> "(xi) In view of above, I observe - (i) that a part of the refund claim has already been sanctioned to the appellant by the Adjudicating authority for the period from 01.02.2017 to 30.06.2017 vide the OIO dated 06.09.2018 whereas the appeal filed by the Revenue against such sanction of Refund claim has been dismissed vide the OIA dated 18.05.2020 and - (ii) that appeal filed by the appellant, against rejection of refund claim for the period 01.10.2016 to 31.01.2017 vide the OIO dated 06.09.2018 as being time barred, has been allowed by the Hon'ble CESTAT (New Delhi) vide the judgment dated 14.08.2019. **Hence, on the same reasoning, the refund claim in appeal having similar grounds for claiming the refund for a period continuing with the period, the refund of which has already been allowed by the CESTAT vide the judgment dated 14.08.2019, needs to be allowed following the settled principle of judicial discipline.**"
>
> **(emphasis supplied)**

60. The order dated 14.08.2019 of the Tribunal, the orders dated 18.05.2020 and 26.05.2020 passed by the Commissioner (Appeals) were before the Assistant Commissioner when the order dated 10.12.2020 was passed by the Assistant Commissioner or the order dated 23.09.2021 was passed by the Commissioner (Appeals), denying the refund to the appellant on the applications filed by the appellant for implementation of the order dated 14.08.2019 passed by the Tribunal and the order dated 26.05.2020 passed by the Commissioner (Appeals).

61. Thus, not only the show cause notices could not have been issued to the appellant in a matter where the appellant had merely sought implementation of the order dated 14.08.2019 passed by the Tribunal and the order dated 26.05.2020 passed by the Commissioner (Appeals), but even otherwise the orders passed by the Assistant Commissioner and the Commissioner (Appeals) on these show cause notices seek to annul to the directions issued by the Tribunal and the Commissioner (Appeals). To maintain the judicial discipline, the Assistant Commissioner had necessarily to implement the decision of the Tribunal and the order passed by the Commissioner (Appeals) and by denying refund, despite specific orders having been passed, the Assistant Commissioner and the Commissioner (Appeals) acted in a manner which can be said to be contemptuous.

62. Under section 11BB of the Excise Act, if the amount is not refunded within three months from the date of the receipt of the application, interest has to be paid to the applicant from the date immediately after the expiry of the three months from the date of receipt of such application till the date of refund of such duty. The uncalled for action of the Assistant Commissioner in denying refund to the appellant would also result in payment of an amount towards interest under section 11BB of the Excise Act to the appellant. It would be for the Government to decide whether the amount of interest that would ultimately be paid by the Government to the appellant should thereafter be recovered from the Assistant Commissioner and the Commissioner (Appeals) who decided matters after the appellant had moved an application for implementation of the orders passed by the Tribunal and the Commissioner (Appeals).

In this connection, reference can be made to the Circulars dated 02.01.2002 and 08.12.2004 issued by the Central Board of Excise and Customs in connection with the return of deposit made under section 35F of the Excise Act or section 129E of the Customs Act. The Board took a decision that not only the pre-deposit amount should be refunded within three months of the decision of appeal in favour of the assessee but also directed that all Commissioners should ensure implementation of the directions. The Board also took a view that any delay beyond three months will be viewed adversely and appropriate disciplinary proceedings will be initiated against the defaulting officers and the amount may also be recoverable from the concerned officers.

63. It is also a fit case where the matter should be referred to the Delhi High Court under section 10 of the Contempt of Court of Act, 1971 for considering whether contempt proceedings should be initiated against Shri Subhash Chandra the Assistant Commissioner, Division-Vasant Kunj, who passed the order dated 10.12.2020 and Shri P.R. Lakra the Commissioner (Appeals-II), Central Tax/Excise, who passed the order on 23.09.2021 for wilful disobedience of the order dated 14.08.2019 passed by the Tribunal in Service Tax Appeal No. 51447 of 2019 (M/s. Delhi Duty Free Services Pvt. Ltd. vs. Commissioner, CGST Division, Delhi South Commissionerate).

64. In view of the aforesaid discussion:

(i) **Service Tax Appeal No. 51853 of 2021** filed by the appellant deserves to be allowed and is allowed. The impugned order dated 23.09.2021 passed by the Commissioner (Appeals) is set aside;

(ii) **Service Tax Appeal No. 50902 of 2020** filed by the Department to assail the order dated 18.05.2020 passed by the Commissioner (Appeals) is dismissed;

(iii) **Service Tax Appeal No. 50901 of 2020** filed by the Department to assail the order dated 26.05.2020 passed by the Commissioner (Appeals) is dismissed;

(iv) **Service Tax Appeal No. 51827 of 2021** filed by the appellant is allowed and the order dated 23.09.2021 passed by the Commissioner (Appeals) is set aside;

(v) The appellant shall be entitled to refund of the amount claimed for the 1st period, 2nd period and 3rd period with applicable rate of interest under section 11BB of the Excise Act;

(vi) It shall be open to the Government, after the aforesaid payment is made, to recover the interest amount from the officers concerned; and

(vii) The matter is referred to the Delhi High Court under section 10 of the Contempt of Court Act, 1971 for consideration as to whether contempt proceedings should be initiated against Shri Subhash Chandra, the then Assistant Commissioner, Division-Vasant Kunj, who passed the order dated 10.12.2020 and Shri P.R. Lakra, the then Commissioner (Appeals-II), Central Tax/Excise, who passed the order dated 23.09.2021 for wilful disobedience of the order dated 14.08.2019 passed by the Tribunal in Service Tax Appeal No. 51447 of 2019 (M/s. Delhi Duty Free Services Pvt. Ltd. vs. Commissioner, CGST Division, Delhi South Commissionerate). The notice may be served on Shri Subhash Chandra and Shri P.R. Lakra through the Chief

Commissioner (AR), Customs, Excise & Service Tax Appellate Tribunal, West Block No. 2, Wing-2, R.K. Puram, New Delhi-110066.

65. A copy of this order shall be sent to the Secretary (Revenue), Government of India for consideration of the directions contained in paragraph 64 (vi) of this order and the Registrar General of the Delhi High Court in terms of paragraph 64(vii) of this order.

(Order pronounced on **28.02.2023**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Shreya