

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL DIARY NO. 24336/2022

COMMISSIONER OF CGST AND CENTRAL EXCISE
MUMBAI EAST

...APPELLANT

VERSUS

FLEMINGO TRAVEL RETAIL LTD

...RESPONDENT

O R D E R

Delay condoned.

2. We have heard learned counsel for the appellant and Mr. Arunabh Chowdhury, learned Senior Counsel for the respondent.

3. The CESTAT, Mumbai, vide order dated 10.02.2022 allowed the appeal filed by the respondent herein for the claim for refund of service tax in relation to the transaction with Mumbai International Airport Limited for the period 01.10.2011 to 30.08.201. Aggrieved by the same, the Commissioner of CGST & Central Excise, Mumbai East has filed the present appeal. The relevant facts in brief for the purpose of this appeal are as under.

4. The respondent M/s Flemingo Travel Retail Limited is engaged in the business of running Duty Free Shops at the arrival and departure terminals of the Mumbai and Delhi International Airports, having service tax registration no. AACCD7412NST001.

5. In pursuance to notification no. 41/2012-ST dated 29.06.2012 issued by the Government of India, Ministry of Finance, wherein a rebate of service tax paid was granted, the respondent assessee filed an application claiming refund of service tax paid by it in respect of charges levied by Mumbai International Airport for the period 01.10.2011 to 30.06.2017.

6. The original adjudicating authority vide order dated 05.07.2019 rejected the refund claims on the ground that payment of service tax on the renting of immovable property of the concerned Duty Free Shops has rightly been levied and is not liable to be refunded as per the provisions of the Finance Act, 1994. The said order was challenged by

the respondent assessee, and an appeal was filed before the Commissioner, Appeals, which was dismissed by the order dated 25.09.2020.

7. Aggrieved by the same, the respondent assessee approached the CESTAT, by filing an appeal which has been allowed by the impugned order dated 10.02.2022.

8. The Tribunal came to the conclusion that Duty Free Shops situate at international airports are a global market competing amongst themselves in a tax exempt environment and the levy of service tax shall be bereft of the lawful authority. In arriving at the said conclusion, the Tribunal has placed reliance on a judgment of this court in the matter of **ITDC Ltd - Hotel Ashoka Vs. The Assistant Commissioner of Commercial Taxes and Anr.**¹, wherein, this court while considering Article 286 of the Constitution of India and a Constitution Bench judgment rendered in the case of **J.V. Gokal & Co. Pvt. Ltd. Vs. Assistant Collector of Sales Tax**² held that there is a legal fiction that

1 (2012) 3 SCC 204

2 AIR 1960 SC 595

transactions outside customs frontiers of India would be said to have taken place outside India and in the course of import or export. It may be relevant to extract the following observations from the said judgment.

"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 taken place and, therefore, in our opinion, the transactions had taken place beyond or outside the custom frontiers of India.”

Therefore, in our opinion, the transactions had taken place beyond or outside the custom frontiers of India.

9. Learned Senior Counsel appearing for the respondent also made a reference to the decision dated 31.08.2018 of the Central Government exercising revisional power in the matter of **Aatish Altaf Tinwala Vs. Commissioner of Customs (Airport), Mumbai**, wherein the following issue was involved in adjudication:

I. Whether a Duty Free Shop, situated after the immigration at the arrival terminal of an International Airport, can be said to be within

Indian Territory in the context of levy and collection of Customs duties?

10. It was held that the Duty Free Shops in international arrival or departure terminals shall be deemed to be the area beyond the customs frontiers of India. The **Writ Petition (C) No. 564/2019** filed challenging the order of the Central Government against the decision of the Bombay High Court was dismissed by this court vide order dated 10.05.2019.

11. Learned Senior Counsel appearing for the respondent also made reference to a judgment dated 28.11.2018 of the Bombay High Court rendered in **Writ Petition No. 8034 of 2018, A1 Cuisine Pvt. Ltd. Vs. Union of India**, on an identical issue. The Bombay High Court in the abovementioned case, while relying on the **Aatish Altaf Tinwala case (Supra)**, held that the duty free shops in the international arrival or departure terminals shall be deemed to be the area beyond the customs frontiers of India, and the same was affirmed by this Court by dismissal of the SLP(C) No. 33011 of 2018 vide

order dated 14.12.2018.

12. The same view in respect of the Duty Free Shops has again been taken by two different High Courts, namely the Bombay High Court in the case of **Sandeep Patil Vs. Union of India** and the Kerala High Court in the case of **CIAL Duty Free and Retail Services Ltd. Vs. Union of India** respectively.

13. Further, it must also be noted that no appeal was filed against the said orders, as can be seen from the communication dated 25.06.2020 and 06.04.2022 issued under RTI Act by the Legal Cell of the Central Board of Indirect Taxes and Customs which has been brought on record by way of Annexure A-14 to the IA No. 70768 of 2023 for placing additional documents on behalf of Caveator/respondent.

14. Significantly, the judgment dated 06.02.2019 in the case of **Sandeep Patil (Supra)** of the Bombay High Court was accepted by the Union of India in the case of Duty Free Shops of the present respondent.

15. We have considered the above orders of the Tribunal, Central Government, High Courts and this court. Keeping in view the aforesaid judgments and Article 286 of the Constitution of India, we are also of the opinion that Duty Free Shops, whether in the arrival or departure terminals, being outside the customs frontiers of India, cannot be saddled with any indirect tax burden and any such levy would be unconstitutional. Therefore, if any tax is levied, the same cannot be retained and the Duty Free Shops would be entitled for refund of the same without raising any technical objection including that of limitation.

16. In the end, learned counsel appearing for the appellant made a passing reference to two pending appeals which according to him raises an identical issue and thus, a request was made to tag this appeal along with the pending appeals.

17. In view of the legal position as discussed above, we are not inclined to keep the instant appeal pending for consideration with the already

pending appeals, which were filed prior to the acceptance of the well reasoned orders of the Bombay High Court, the Kerala High Court and the Union of India. However, we leave it open to the Central Board of Indirect Taxes and Customs to take appropriate decisions in respect of the continuation of the said appeals in the light of the view taken by us, as they deem fit and appropriate.

18. In view of the aforesaid facts and discussions, the present Civil Appeal stands dismissed.

.....J.
(KRISHNA MURARI)

.....J.
(SANJAY KAROL)

NEW DELHI
10th APRIL, 2023

ITEM NO.13

COURT NO.13

SECTION XVII-A

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

CIVIL APPEAL Diary No(s). 24336/2022

(Arising out of impugned final judgment and order dated 10-02-2022 in STA No. 85046/2021 passed by the Custom Excise Service Tax Appellate Tribunal, West Zonal Bench At Mumbai)

COMMISSIONER OF CGST AND CENTRAL EXCISE MUMBAI EAST Appellant(s)

VERSUS

FLEMINGO TRAVEL RETAIL LTD

Respondent(s)

(IA No.138363/2022-CONDONATION OF DELAY IN FILING and IA No.138364/2022-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT and IA No.138366/2022-STAY APPLICATION and IA No.138362/2022-CONDONATION OF DELAY IN REFILEING / CURING THE DEFECTS)

Date : 10-04-2023 This petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE KRISHNA MURARI
HON'BLE MR. JUSTICE SANJAY KAROL

For Petitioner(s) Mr. N. Venkatraman, A.S.G.
Mr. H. Raghvendra Rao, Adv.
Mr. Mukesh Kumar Maroria, AOR
Ms. Praveena Gautam, Adv.
Mr. Aziz Kamal Shukla, adv.
Mr. H.r. Rao, Adv.
Mr. Ashok Panigrahi, Adv.
Ms. Priyanka Das, Adv.

For Respondent(s) Mr. Arunabh Chowdhury, Sr. Adv.
Mr. Karma Dorjee, Adv.
Mrs. Pragya Baghel, AOR

UPON hearing the counsel the Court made the following
O R D E R

Delay condoned.

The Civil appeal is dismissed in terms of the signed order.

(SONIA GULATI)
SENIOR PERSONAL ASSISTANT

(BEENA JOLLY)
COURT MASTER (NSH)

(signed order is placed on the file)