

Court No. - 1**Case :-** P.I.L. CIVIL No. - 12929 of 2019**Petitioner :-** Atin Krishna**Respondent :-** U.O.I.Thru Secy. Ministry Of Finance And Ors.**Counsel for Petitioner :-** Atin Krishna (In Person)**Counsel for Respondent :-** C.S.C.,A.S.G.,Sheeran Mohiuddin Alavi,Shubham Tripathi**Hon'ble Pankaj Kumar Jaiswal,J.****Hon'ble Rajnish Kumar,J.**

1. Heard Sri Atin Krishna petitioner-in-person, Sri Savitra Vardhan Singh, learned counsel for the Union of India-respondent no.1 Sri Manish Mishra, learned counsel for the State-respondent no.2 and Sri Sameer Rohatgi, learned counsel for the respondent no.3.

2. This petition is filed in public interest seeking to ensure that the provisions of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "CGST Act") Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as "SGST Act") and Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as "IGST Act") are implemented in proper manner qua the duty free shops (hereinafter referred to as "DFS") operated at Chaudhary Charan Singh International Airport, Lucknow (hereinafter referred to as "Airport") by respondent no.3.

3. The petitioner submitted that due to the mis-interpretation of the provisions of CGST/SGST/IGST Acts, (GST Act), the public exchequer is being made to suffer huge financial loss and therefore, it is necessary in public interest that this Court provides true and correct interpretation of the applicable provisions of the aforesaid

enactments so as to ensure that the revenue loss to the public exchequer is forthwith prevented.

4. The petitioner alleged that the respondent no.3 herein, has been operating at the arrival and departure termination of Airport since 2004 and the operations of these shops are governed in accordance with the provisions of Customs Act 1962. The respondent no.3 is required to obtain registration of its business under CGST Act and SGST Act and is allotted respective GSTIN numbers and owing to registration obtained under the respective Acts, the activity undertaken by the respondent no.3 also attracts the provisions of GST Act. However, the provisions of these enactments are being mis-interpreted and the DFS operated by the respondent no.3 are presently enjoying various exemptions causing severe loss of revenue to the public exchequer.

5. The contention of the petitioner is as under:-

(i) The respondent no.3 is liable to pay IGST on the goods imported into the territory of India, which it is not doing.

(ii) Despite the DFS operated by the respondent no.3 being in the State of Uttar Pradesh, the goods were sold to the International passengers without charging the applicable taxes under CGST and SGST Acts. The petitioner submitted that the requirement to charge applicable CGST and SGST on the sale of goods at the DFS of the respondent no.3 was prior to Amendment of GST Act i.e. upto 31st January, 2019.

(iii) The respondent no.3 is incorrectly permitted to claim refund of accumulated input

tax credit of GST paid on service of renting of immovable property by AAI and procurement of domestic goods and services. This refund is being granted under the grounds that the sale made to the International passengers at the departure terminal DFS is exports of goods and hence zero-rated. The sale invoice issued to the International passengers is incorrectly being considered as proof of exports of goods.

6. The petitioner submitted that a transaction must suffer IGST the moment the supply of goods cross the territorial waters of India. Therefore, the supply of imported goods to respondent no.3 needs to be subjected to tax under Section 5 of the IGST Act. He further submitted that from the standpoint of Section 8 (1) of the IGST Act, the sale made to International passengers at the arrival terminal DFS of the respondent no.3 should be considered as intra state supply of goods and accordingly, such sale shall attract applicable CGST and SGST under Section 9 (1) of the CGST Act and SGST Act upto 31st January, 2019 and that the activity undertaken from the departure terminal DFS operated by the respondent no.3 is not an export of goods under GST Act as the essential ingredients to qualify for export is nothing being satisfied by the respondent no.3. The grounds mentioned in the writ petition is based upon a reported decision of Hon'ble Apex Court rendered in the matter of ***Burmah Shell Oil Storage and Distributing Co. of India Ltd. Vs. CTO (1961) 1 SCT 902, State of Kerala Vs. Cochin Coal (1961) 12 STC 1 (SC), Madras Marine Co. Vs. State of Madras, 1986 (3) SCC 552*** as well as Judgement rendered by Bombay High Court in the

matter of ***Narang Hotels and Resorts Pvt. Ltd. Vs. State of Maharashtra and others (2004 135 STC 289 (Bom.)***

7. Learned counsel for the respondent no.3 opposed the petition by filing reply. He submitted that supply of goods to and from the DFS is before the clearance of imported goods for home consumption/export and the supply of goods from DFS at International Airports are considered as export of goods. He relied upon the decision of Hon'ble Supreme Court rendered in the matter of ***M/s Hotel Ashoka (India Tourism Development Corporation Limited) Vs. Assistant Commissioner of Commercial Taxes and another*** (Civil Appeal No. 2560 of 2010) reported in ***2012 (276) FLT 433 (SCC)***, judgement rendered by Bombay High Court in the matter of ***Sandeep Patil Vs. Union of India & another*** in Criminal Public Interest Litigation St. No.3 of 2019 and the Central Government's order dated 31.08.2018 bearing No. 634/2018- CUS (WZ)/ASRA/Mumbai passed under Section 129 DD of the Customs Act, 1962 in the case of Aarish Altaf Tinwala.

8. Learned counsel for the respondent no.3 has further submitted that the provisions of IGST Act (i.e. Sections 5, 7 and 8) are relevant for the purpose of addressing the contentions raised in the present PIL. The supply of goods imported into the territory of India till they cross customs frontiers are considered as Inter-State Supply as per Section 7 (2) of the IGST Act which reads as follows:-

"7(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce"

9. On a careful reading of Section 7 (2) along with Sections 2 (10), 2(4) of IGST Act and Sections 2 (11) and 2 (13) of Customs Act, 1962, it is concluded that **"crossing the customs frontier of India"** under the IGST Act means crossing the limits of custom area which includes the area of customs port, customs airport or land customs station or a warehouse and also any area in which imported goods are ordinarily kept before clearance by customs authority. The DFS located in the custom airport, the custom warehouse are both part of the custom area as defined under Section 2 (11) of the Customs Act, 1962. The supply of imported goods to and from the DFS do not cross the customs frontier and hence these supplies will be an inter-State supply in accordance to Section 7 (2) of the IGST Act. Consequently, they cannot be an inter-State supply liable to CGST and SGST under Section 9 of the CGST Act and SGST Act.

10. The point of time is one of the essential ingredients for levy of integrated tax on supply of goods imported into India and is governed by the proviso of Section 5 (1) of the IGST Act read with the provisions of Customs Act, 1962. Section 5 (1) of the IGST Act provides for levy of GST on inter-State supply, which reads as follows:-

"5(1) Subject to the provisions of sub-section (2), **there shall be levied a tax called the integrated goods and service tax on all inter-State supplies of goods or services or both**, except on the supply of alcoholic liquor for human consumption, on the value determined under Section 15 of the Central Goods and Service Tax Act and at such rates, not exceeding forty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person:

Provided that the integrated tax on goods imported into India shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975 on the value as determined under the said Act at the point when duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962"

(ii) Sub-Section (7) of Section 3 of the Customs Tariff Act, 1975 reads as under:-

"(7) Any article which is imported into India shall, in addition, be liable to integrated tax at such rate, not exceeding forty per cent as is leviable under Section 5 of Integrated Goods and Services Tax Act, 2017 on a like article on its supply in India, on the value of imported as determined under sub-Section (8).

11. Section 7 (2) read with proviso of Section 5 (1) of the IGST Act states that integrated tax on "goods imported into India" shall be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975. Further, such tax is required to be levied "at the point" when

the duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962 and at no other point.

12. The point of time when duties of customs are levied on goods imported into India under Customs Act, 1962 is only when such goods are cleared for home consumption. It is read as under:-

*"12(1) Except as otherwise provided in this Act or any other law for the time being in force, **duties of customs shall be levied** at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force **on goods imported into, or exported from India**".*

13. Hon'ble Apex Court in the matter of **Kiran Spinning Mills Vs. Collector of Customs, 1999 (113) ELT 0753 SC** held as under:-

*"...this Court has held in Sea Customs Act-1964 (3) SCR 787 at page 803 that in the case of duty of customs the taxable event is the import of goods within the customs barriers. In other words, **the taxable event occurs when the customs barrier is crossed. In the case of goods which are in the warehouse the customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country**".*

14. Similarly, Hon'ble Apex Court, in the matter of **Garden Silk Mills Ltd. Vs. Union of India, 1999 (113) ELT 0358 S.C.**, observed that the taxable event for levy of customs duty is reached when the bill of entry for home consumption is filed. The relevant part of the judgement reads as follows:-

"...It would appear to us that ***the import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed***".

15. The above observations of Hon'ble Apex Court make it clear that the effective taxable event for the purpose of levy of Customs Duty is the time only when the goods cross the customs barrier and the bill of entry for home consumption is filed i.e. when the goods become part of the mass of goods within the country. Therefore, when the goods are imported from outside India and are kept in customs warehouse and exported therefrom, the stage for payment of customs duty under Customs Act, 1962 does not arise. Hence neither Custom duty nor IGST is payable.

16. The warehouse goods are supplied by the DFS to the International arriving passengers before its clearance for home consumption. The arriving passengers thereafter cross the customs frontier at the airport along with the goods and only then clears the same for home consumption. The passenger is therefore liable to pay the applicable duties of customs. The goods being a part of passenger's bonafide baggage are cleared for home consumption by the passenger under the Baggage Rules, 2016 and not by the DFS, hence no customs duty is payable by the DFS and therefore under proviso of Section

5 (1) of the IGST Act read with Section 12 of the Customs Act 1962, No IGST is payable either.

17. The supply of warehoused goods by the DFS at the departure terminal is to departing International passengers i.e. the passengers travelling from India to a foreign destination. Thus, the goods supplied are never cleared for home consumption and the warehoused goods are exported by the DFS, therefore the levy Customs duty and of the IGST do not arise.

18. The above observations conclude that IGST is not payable on the supply either to or from the DFS located at the arrival or at departure terminal.

19. The definition of "exports of goods: in Section 2 (5) is simply taking of goods from India to a place outside India. This definition is identical to the definition in Section 2 (18) of Customs Act 1962. In the case of **Collector of Customs, Calcutta Vs. Sun Industries 1988 SCR (3) 500** under the Customs Act, 1962, the issue was as to whether the goods loaded on a ship which had passed beyond the territorial waters of India, by reason of some engine trouble decided to sail back into the territorial waters of India, can be said to have been exported out of India. Section 2 (18) of the Customs Act, 1962 defines the term "export" as under:-

"2(18) "export", with its grammatical variations and cognate expressions, means taking out of India to a place outside India."

The Apex Court, analysing the above Section held as under:-

"... But the expression "taking out to a place outside India" would also mean a

place in high seas. It is beyond the territorial waters of India. High Seas would also mean a place outside India, if it is beyond the territorial waters of India. Therefore, the goods were taken out to the high seas outside territorial waters of India, they will come within the ambit of expression "taking out to a place outside India". Indubitably the goods had been taken out of India. "Place" according to Webster Comprehensive Dictionary, International Edition page 964 means a particular point or portion of space, especially that part of space occupied by or belonging to a thing under consideration; a definite locality or location. It also means an open space or square in a city. ***Therefore, in international trade the ship beyond the territorial waters of a country would be a place outside the country, if the goods are taken to that place, that is to say, a situation outside the territorial waters of a country and the title to the goods passes to the purchasers. Then, in our opinion, the goods are taken to a place outside India...."***

20. The Hon'ble Apex Court held that "taking out to a place outside India" would also mean a place beyond territorial waters, i.e. high seas hence in the context of Section 2 (5) of IGST Act, to constitute an "export" mere taking out of India, is enough.

21. Export of goods is a zero rated supply and a person making zero rated supplies can claim refund of unutilised ITC as provided in Section 16 (1) and Section 16 (3) of the IGST Act, which reads as under:-

"16 (1) "zero rated supply" means any of the following supplies of goods or services or both, namely:

(a) **export of goods or services or both;**
or

(3) *A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:-*

(a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or..."

Thus for claiming the benefit of refund, the supply must be a zero rated supply such as "exports of goods".

22. Since the entire activity of a DFS namely, warehousing, stocking and sale/supply happens as per the provisions under Chapter IX of the Customs Act and under Customs supervision and control. The sale of goods takes place only to International passengers and on obtaining from them payment in approved currency. Every sale is covered by a sale voucher, which shall be deemed to be the Shipping Bill or Bill of Entry under Section 69 or 68 as the case may be. As a condition of the license granted to DFS under Section 58A of the Customs Act, DFS are permitted to deposit the goods at the warehouse without payment of duty on execution of a bond. As per Section 71 of the Customs Act, the goods so deposited can either be cleared from the warehouse for home consumption (u/s 68) or for export (u/s 69) or for removal to another warehouse or otherwise provided in the Customs Act. Further Section 73A, Custody and Removal of Warehoused Goods, of the Customs Act provides that all warehoused goods shall remain in the custody of person who is granted a license

under Sections 57/58/58A of the Customs Act until they are cleared for home consumption or transferred to another warehouse or are exported or removed as otherwise provided in the Customs Act. Such warehoused goods are thereafter only allowed to be cleared for home consumption after filing a bill of entry under Section 68 and payment of duty. In the event where the warehoused goods are not cleared for home consumption, they can be cleared for export, without payment of duty under Section 69 after filing shipping bill for export.

23. The Public Notice dated 22.07.2004 [Para 4.1], Standing Order dated 03.03.2008 (para 3.3) and Public Notice dated 21.12.2018 [Para 7.1] submitted by the respondent no.3 further clarifies that the invoice issued to passenger at International departure terminal is deemed to be a "shipping bill" for the purpose of exports under Section 69 of the Customs Act and the Section 50 of the Customs Act provides that a 'shipping bill' has to be presented to the customs officer for export of goods in an aircraft.

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

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

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

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

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

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

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

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

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

goods are appropriated outside India. In view thereof, it is clear that the decisions relied upon by the petitioner are misplaced, have no relevance to the facts of the present PIL and therefore cannot be relied upon in the context of the business undertaken by the answering respondent no.3.

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

30. Accordingly, we dismiss the Public Interest Litigation.

31. No order as to cost.

[Rajnish Kumar,J.] [Pankaj Kumar Jaiswal,J.]

Order Date :- 3.5.2019

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