IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 30.03.2021
CORAM
THE HON'BLE MR.JUSTICE C.SARAVANAN
W.P.No.4055 of 2018
and
W.M.P.No.4981 of 2018
(Through Video Conferencing)

Flemingo Dutyfree Shop Private Limited,
Represented by its Authorized signatory,
R.Murali,
Duty Free shop at Chennai International Airport,
Chennai,
Having registered office at No.D73/1, TTC,
Industrial Area, Turbhe, MIDC,
Navi, Mumbai 400 705. ... Petitioner

Vs.

1.Union of India,
Represented by the Secretary,
Ministry of Finance, North Block,
New Delhi, 110 001.

2.State of Tamilnadu,
Represented by the Secretary,
Ministry of Finance,
Finance Department Secretariat,
Chennai.

3.Airports Authority of India,
Represented by its Chairman,
Rajiv Gandhi Bhavan,
Safdarjung Airport, New Delhi 110 003.

4.Airport Director,
Chennai International Airport,
Chennai 600 027. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus directing the respondents to not to impose Goods and Service Tax under the Central Goods and Service Tax Act, 2017; the Integrated Goods and Service Tax Act, 2017; the Tamil Nadu Goods and Service Tax Act, 2017 and other Rules there under to the Petitioner's Arrival and Departure Duty Free Shops operated at Chennai International Airport, Chennai in terms of the Concession Agreement dated 16.06.2016 and/or payments being made by the petitioner towards Minimum Guarantee / Revenue Share pursuant to and/or under Concession Agreement; and consequently direct the respondents to refund to the petitioner, the sum of Rs.3,31,30,829.85 (Rupees

Three Crores Thirty One Lakh Thirty Thousand Eight Hundred Twenty Nine and Eight Five Paisa Only), as collected by Respondent Nos.3 and 4 on the behalf of 1st and 2nd respondents on wrongful applicability of the Central Goods and Service Tax Act, 2017; the Integrated Goods and Service Tax Act, 2017; the Tamil Nadu Goods Service Tax Act, 2017 and other Rules thereunder.

For P : Mr.V.Sridharan, Senior Counsel for Mr.Muthuvenkataraman

For R1 : Mr.A.P.Srinivas, Senior Standing Counsel

For R2 : Mr.R.Swarnavel, Government Advocate

For R3 & R4 : Father Xavier, Senior Counsel for M/s.A.Arul Mary

ORDER

This Writ Petition has been filed for a Writ of Mandamus directing the respondents to not to impose Goods and Service Tax under the Central Goods and Service Tax Act, 2017; the Integrated Goods and Service Tax Act, 2017; the Tamil Nadu Goods and Service Tax Act, 2017 and other Rules there under to the petitioner's Arrival and Departure Duty Free Shops operated at Chennai International Airport, Chennai in terms of the Concession Agreement dated 16.06.2016 and/or payments being made by the petitioner towards Minimum Guarantee / Revenue Share pursuant to and/or under Concession Agreement and consequently direct the respondents to refund a sum of Rs.3,31,30,829.85/- to the petitioner as collected by the third and fourth respondents on behalf the first and second respondents on wrongful applicability of Central Goods and Service Tax Act, 2017; the Integrated Goods and Service Tax Act, 2017; the Tamil Nadu Goods and Service Tax Act, 2017 and other Rules there under.

2. The petitioner had filed similar Writ Petitions before the Kerala High Court and before the Madurai Bench of this Court. These Writ Petitions were predicated on the ground that since the petitioner's shop was located within the Chennai International Airport, Chennai, no tax was payable and therefore, the third and fourth respondents were not required to collect Goods and Service Tax (GST) for renting immovable property namely, Arrival and Departure Duty Free Shops from the petitioner.

3. The Madurai High Court has recently disposed the Writ Petition filed by the petitioner vide its order dated 11.03.2021 in W.P.(MD) No.2129 of 2018. The operative portion of this order reads as under:-

5. I am of the view that the very same approach can be adopted in the case on hand also. Of course, a slight tweaking will be required. This is because the fourth respondent had paid GST to the first respondent for the period from 01.01.2018 to 31.03.2018. In this view of the matter, this writ petition is disposed of in the following terms :

a) In as much as the petitioner would be entitled to refund of ITC on the GST paid by them, I am of the view that no purpose will be served by asking the petitioner to pay GST and thereafter claim refund. Therefore, for the period prior to 28.02.2021, the petitioner need not pay any GST to the fourth respondent.

b)Since the fourth has paid GST for the period from 01.01.2018 to 31.03.2018, even though the petitioner has not paid, the first respondent has to refund to the fourth respondent.

c) The petitioner has to pay GST on the concession fee to the fourth respondent and thereafter claim refund as per Section 54 of the CGST Act with effect from 01.03.2021.

4. The learned Senior Counsel appearing for the petitioner submits that the same order can be passed for the period in the present Writ Petition as well. It is case of the petitioner that on introduction of GST, the third and fourth respondents had charged GST for renting of the petitioner's shops situated within the Airport during the period between July 2017 and December 2017. The petitioner was forced to pay tax and therefore refund claims under Section 54 of the respective GSTs read with Section 16 of the Integrated Goods and Service Tax Act, 2017 which has been granted for the aforesaid period.

5. It is submitted that since the petitioner had earlier obtained a stay order from Madurai Bench of this Court in W.P. (MD) No.2129 of 2018, same order was also passed by this Court on 23.02.2018 in this Writ Petition. Under these circumstances, it appears that the third and fourth respondents proceeded to pay an amount of Rs.18,68,95,333.19/- as tax directly to the Government of India without collecting it from the petitioner. Fr.Xavier, the learned Senior Counsel for the third and fourth respondents also confirmed the same. It is submitted that this amount may be directed to be refunded back to the third and fourth respondents for the period between 01.01.2018 and 31.07.2019.

6. As far as the period starting from July 2019 till date is concerned, in view of the stay granted by the Madurai Bench of this Court and other decisions of the Bombay High Court, the third/fourth respondent Airport Authority has neither collected any GST nor paid the same to the Central Government. The Airport Authority estimates the tax due for the said period to Rs.10,66,85,596.95.

7. The learned Senior Counsel appearing for the petitioner would therefore submit that since the issue is revenue neutral and since the petitioner is engaged in zero rated supply at its Arrival and Departure Duty Free Shops inside the Airports, the petitioner is eligible for refund of input tax borne by it and therefore, the petitioner undertakes to discharge the Goods and Service Tax for the period commencing from April 2021 and claim refund in terms of Section 54 of the Goods and Service Tax, 2017 and Integrated Goods and Service Tax Act, 2017. He further submits that since for the period commencing from 01.01.2018 to 31.07.2019, the third and fourth respondents have already paid the tax, same may be directly refunded back to them. For the period commencing from July 2019 till date, since no tax has been neither collected nor paid, there can be a waiver of GST as any tax to be paid by the third and fourth respondents refundable under Section 54 of the CGST Act, 2017 and the issue is revenue neutral. He therefore prays that similar order may be passed in terms of the decision of the Madurai Bench of this Court in W.P.(MD) No.2129 of 2018.

8. This Writ Petition is contested by the learned counsel for the first respondent. It is submitted that the petitioner has no locus standi in as much as the petitioner is not responsible for payment of GST for renting of the shops from the third and fourth respondents and therefore, this Writ Petition is liable to be dismissed.

9. It is therefore submitted that third and fourth respondents the Airport Authority of India are liable to pay tax. If the petitioner is entitled for refund of such tax, it is for the petitioner to file appropriate refund claims under the Central Goods and Service Tax Act, 2017, the Integrated Goods and Service Tax Act, 2017, the Tamil Nadu Goods and Service Tax Act, 2017. He therefore submits that this Writ Petition is liable to be dismissed as not maintainable.

10. I have considered the arguments advanced by the learned counsel for the petitioner, the learned Senior Standing Counsel for the first respondent, the learned Government Advocate for the second respondent and the learned Senior Counsel for the third and fourth respondents.

11. There is no dispute that the petitioner is engaged in zero rated supply within the meaning of Section 16 of the Integrated Goods and Service Tax Act, 2017. The petitioner has filed refund application in Form GST RFD-01A on 22.10.2019 for the period between August, 1017 and December, 2017. By an order dated 27.11.2019 bearing reference Order No.RFDCGST/SGST/131/2019 (R), the refund was also sanctioned.

12. Similarly, for the period between February, 2018 and March, 2018 also, refund claim has been sanctioned by the GST Authorities by way of an order dated 02.12.2019 bearing reference Order No.RFDIGST/CGST/SGST/135/2019 (R).

13. These orders are based on the order passed by the Authority for Advance Ruling, Delhi in the case of M/s.Rod Retail Private Ltd. which was circulated by Central Board of Indirect Taxes and Customs vide a Communication dated 29.05.2018. Thus, the tax liability on account of supply of goods and service at the Airport Authority of India is revenue neutral issue in the hands of the petitioner having no implication on over all collection of tax as the petitioner is entitled for refund of input tax borne on various input / input services utilised at its Duty Free Shop located inside the Airports. Therefore, there is no useful purpose in directing the third and fourth respondents Airport Authority to pay the tax for the past period and thereafter, it is for the petitioner to file refund claims in Form GST RFD-01A as the incidence of tax that has to be passed on the petitioner is refundable to the petitioner.

14. Since the issue is revenue neutral, I also do not find any merits in directing the third and fourth respondents to charge the GST on the petitioner for the period between July 2019 and March 2021 and to remit the same as whatever tax is payable and chargeable and the incidence of such tax which is to be passed on the petitioner is liable to be refunded back to the petitioner.

15. Therefore, this Writ Petition is disposed of with the following directions and observations:-

i. The third respondent is directed to charge GST on the petitioner for the period commencing from April 2021 and to pay the same to the credit of the Government.

ii. As far as the GST paid by the third respondent for the period between 01.01.2018 and 30.06.2019 is concerned, same is ordered to be refunded back to the third respondent directly subject to the verification that such tax was indeed correctly paid to the credit of the Government for the supply of such service to the petitioner.

iii. As the issue is revenue neutral for the period between July 2019 and March 2021 during the subsistence of interim order when neither GST was collected nor paid, the first respondent and the jurisdictional officer of the first respondent shall not charge GST from the third respondent for such supply of service to the petitioner alone for renting of duty free shops within the Chennai Airport to the petitioner.

iv. It is made clear that going forward, there shall be no further concession either to the petitioner or to the third respondent from paying GST for the supply of service commencing from 1st April, 2021.

v. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

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

2.The Secretary,
State of Tamilnadu, Ministry of Finance,
Finance Department Secretariat, Chennai.

3.The Chairman,
Airports Authority of India,
Rajiv Gandhi Bhavan,
Safdarjung Airport, New Delhi 110 003.

4.Airport Director,
Chennai International Airport,
Chennai 600 027.

+1 cc to M/s.S.MuthuVenkataraman, Advocate, SR.NO.21988
+1 cc to M/s. The Special Government Pleader(Tax),SR.No.21289
+2 cc to M/s.Father Xavier Associates, SR.NO.21163

W.P.No.4055 of 2018
and W.M.P.No.4981 of 2018

SSN(CO)
NS(10/05/2021)