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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 22.06.2021

PRONOUNCED ON: 03.02.2022

CORAM:

THE HON'BLE Dr.JUSTICE ANITA SUMANTH

W.P. Nos.35517 and 35521 of 2019
and
WMP. No.36360 of 2019

M/s.Plus Max Duty Free (Kovai) Pvt. Ltd.,
No.86/18, Royal Complex
Sankari road, Seetharampalayam
Thiruchengode
Tamil Nadu 637 209.

.. Petitioner in both WPs

Vs

1. Principal Chief Commissioner of GST
& Central Excise
26/1, Uthamar Gandhi Rd,
Thousand Lights West,
Nungambakkam, Chennai,
Tamil Nadu - 600 034.

2. The Commissioner of State Taxes,
Ezhilagam, Chennai - 600 005.

3. The Joint Commissioner (CT),
Salem Division,
Commercial Taxes Building,
Fort Main Road, Salem - 636 001.

4. Airport Authority of India,
Coimbatore International Airport,
Coimbatore - 641 014.

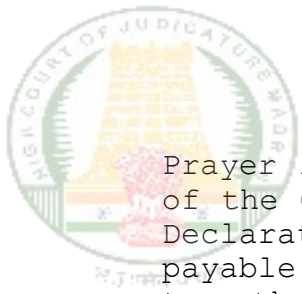
... Respondents 1 to 4 in both WP's

5. Assistant Commissioner, Peelamedu,
South Assessment Circle, Coimbatore.

6. Commissioner of GST, Central GST Office,
Nadar Colony, Ramanathapuram,
Coimbatore - 611 019.

(R5 & R6 suo motu impleaded as per order
Dated 29.01.2020 made in WP.No.35517 of 2019)

... Respondents 5&6 in WP.No.35517/2019



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Prayer in W.P.No.35517 of 2019: Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Declaration declaring the no Goods and Services Tax (GST) is payable on the 'Monthly Concession Fees' paid by the petitioner to the 4th respondent under Concession Agreement dated 24.10.2016.

Prayer in W.P.No.35521 of 2019: Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Mandamus forbearing the respondent from collecting Goods and Services Tax (GST) on the 'Monthly Concession Fees' paid by the petitioner to the 4th respondent under Concession Agreement dated 24.10.2016.

In both Wps

For Petitioner : Mr.Aditya Reddy

For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel - R1&6
(in WP.No.35517 of 2019)
and for R1 in WP.No.35521 of 2019

Mr.N.R.R.Arun Natarajan,
Government Advocate - R2, 3,5
in WP.No.35517 of 2019
and for R 2&3 in WP.No.35521 of 2019

Mr.J.Narayanasamy
Senior Standing Counsel-R4 in both WP's

C O M M O N O R D E R

The petitioner manages Duty Free Shops (DFS) in various Airports in the Country and is a subsidiary of a Malaysian Company. The present Writ Petitions relate to liability to Integrated Goods and Service tax (IGST) in regard to the DFS in the Coimbatore Airport, in respect of which licence was awarded to the petitioner in open tender.

2. Being successful in the auction conducted for allotment of licences in respect of DFS, the petitioner entered into a Concession Agreement (CA) dated 24.10.2016 with the Airports Authority of India/R4/AAI. The CA provides, at clauses 10.4 and 10.5 thereof, that the concession fee paid by the concessionaire, i.e., the petitioner to AAI, shall be exclusive



High Court. The issue in arbitration concerned the liability of the contractors to service tax under Finance Act, 1994.

9. The decision in the Section 34 petition was challenged by RINL before the Hon'ble Supreme Court, and the stand of RINL was that the contract provided for a shifting of tax liability from itself to the contractor. In that context, the Hon'ble Court, at paragraph 26 states as follows:

26. As far as the submission of shifting of tax liability is concerned, as observed in paragraph 9 of Laghu Udyog Bharati (Supra), service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax. Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.

10. The conclusion was to the effect that though the liability to service tax fell on the contractor as per the clauses of the contract, the principal liability to tax was on RINL only. In such a case, the provisions concerning service tax would be relevant only as between RINL and the Service Tax Department and would be of no consequence to determine the rights and liabilities between the two private parties, that is, RINL and the contractors.



11. The above decision should be seen in the context of the lis between the parties which concerned a private contract. The issue related to whether RINL or its contractor would meet the liability to service tax, and in this context, the submission urged was that the contract provided for a shifting of the liability from one to the other. It was in this factual matrix that the Court made the observation that even though the incidence of tax as per contract fell upon the private party by virtue of the contract, the primary liability fell upon RINL by operation of statute and it was only the latter that was entitled to challenge the same.

12. In the case of Balabaskar (supra), a Division Bench of this Court was concerned with a prayer for declaration that Circular 151/2/2012 dated 10.02.2012 issued by the Central Board of Excise and Customs, and recommendations made by the Tax Research Unit of the Ministry of Finance, were unconstitutional and liable to be struck down.

13. There was an agreement inter se the private parties in that case entitled 'agreement for development' and as per clause 23 of that agreement, parties of the first part were liable to pay all taxes including Service tax and Value Added tax. The developer was thus mulcted with the demand of service tax passed on by the agreement holder and challenged such liability. The original challenge was to the tax demand, applicable statutory provisions and Circulars under which the demand was made. The prayer was modified subsequently so as to cover only the Circular and the recommendations of the Board.

14. At paragraph 7 of the decision, the Division Bench holds the Writ Petition not maintainable, as the statutory tax liability fell upon only the developer. The contract in that case provided that the service provider, i.e., the developer, was at liberty to decide whether he would satisfy the tax demand or pass the burden on to the recipients. If he chose to pass the burden onward, there could be no challenge to such demand by the recipient, the Bench concluded.

15. Reference was made to a judgment of the Hon'ble Supreme Court in Assistant General Manager, Central Bank of India V. Commissioner, Municipal Corporation (1995 (4) SCC 696), wherein the tenant had challenged the enhancement of tax levied by a local body. The challenge was contested by the local body on the ground that the levy was upon the landlord and that the tenant therefore, did not have the locus standi to challenge the same.

16. Though the High Court sustained the objection on maintainability, the Supreme Court reversed the order holding



that despite the arrangement being private between landlord and tenant, the right of the tenant to challenge the enhancement cannot be defeated. The challenge was held maintainable.

17. The aforesaid judgement has been distinguished by the Division Bench stating that the agreement between the parties in that case had a clause to the effect that in the event the property tax was enhanced, then the burden of the payment would be passed on to the tenant. Thus the tenant in that case had the right to guard himself against such liability, even assuming that the owner was willing to submit himself to the same, to the detriment of the tenant.

18. However, in the case of Balabaskar, the Bench held that what was challenged was a Circular which imposed the liability and in such circumstances, the concept of locus standi could not be extended beyond permissible limits. The agreement between the parties provided for a liability which was subsisting at the time when the agreement was entered into and thus the individual could not be permitted to turn around at a later date and challenge the liability. At paragraph 14, they state as follows:

14. The contention that the person, to whom the burden of tax is ultimately passed on, is entitled to challenge a levy, if accepted, would lead to disastrous consequences. Any increase in the incidence of sales tax affects all consumers of all products. Therefore, any person will be entitled to come and challenge the increase in the levy on the ground that the manufacturer or dealer will eventually pass on the burden only to the ultimate consumer. We can quote any number of examples of this nature. Every citizen is a consumer of any number of products. Every Finance Act imposes an additional burden upon many such products. Millions of consumers are entitled to come and challenge such levies, if such a contention is accepted. Therefore, we are of the considered view that the petitioner has no locus standi to challenge the above circulars.

19. The position in the present case is different in so far as the impugned levy arises from an interpretation of the statutory provisions that directly impact the interests of the petitioner. The concessionaire agreement between the petitioner and the 4th respondent provides for the work of developing, operating and maintaining duty free retail outlets at designated locations at the Airport, for which, the petitioner was awarded



license. The Authority therein is R4, the AAI and the petitioner is the Concessionaire. The object of the Agreement is set out at Clause 'C' and reads as follows:

'C. The Authority, with the objective of providing better amenities to the Airport Users and in the overall public interest, is desirous of awarding the work of developing, operating and maintaining Duty Free Retail Outlets at designated Locations (hereinafter defined) at the Airport (the "Concession"), to a private entity, in accordance with the terms and conditions set forth herein.'

20. Towards the satisfaction of the terms of the Commission Agreement, the petitioner was obliged to carry out a series of activities set out in Article 3.1 of the agreement. Article 10.1 deals with Concession Fee and Article 10.1, to the extent to which it is relevant to understand the transaction, is extracted below:

'10.1 Concession Fee

In consideration for the grant of Concession, the Concessionaire shall pay to the Authority, a concession fee (the 'Concession Fee') in relation to each of the Location(s) (including Alternation Location(s), if any) in accordance with this Article.'

21. Thus, the petitioner was to pay to the authority a concession fee which was to be determined as per Articles 10.2 and 10.3 of the agreement and in the manner set out therein. Article 10.4 deals with tax liability thereupon and reads as follows:

'10.4 Taxes

The Concession Fee paid by the Concessionaire to the Authority shall be exclusive of Taxes and all Taxes shall be paid over and above the Concession Fee. The payment of Taxes in respect of the Concession Fee, the usage of the Location, operations of the Duty Free Retail Outlets shall be the obligation of the Concessionaire and shall be borne by the Concessionaire at its own risk and costs. The Concessionaire shall remit the amount of Service Tax in respect of the use of the Locations to the Authority. It is clarified



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that the Concessionaire shall pay the Taxes, except the Service Tax in respect of the use of the Locations, directly to the relevant Governmental Authorities which shall be over and above the concession Fee. Direct taxes including withholding tax on respect income shall be borne by the respective Parties.'

22. The case of the petitioner is that the rentals paid are in respect of property situated outside of the customs frontier not liable to tax under the provisions of the GST Act. This is a legal issue and one that impacts the petitioner directly. Though the agreement contemplates the settlement of tax dues by the DFS, it is required only to pay such taxes as are appropriate and liable to be levied. It certainly cannot be called upon to remit taxes that are not in consonance with the provisions of the Act and it thus cannot be stated that the petitioner/licensee is a stranger to the impugned levy.

23. Thus, either the authority or the petitioner may challenge such levy and since the authority shows no interest in contesting the matter on merits but restricts itself to the argument on maintainability, in my view, it is quite appropriate for the petitioner to raise the challenge. For the aforesaid reasons, this writ petition is held maintainable.

24. On merits, the relevant provisions to be considered are Section 1(2), as per which, the IGST Act extends to the whole of India, Section 2(4) which defines 'customs frontiers of India', Section 2(6) defining 'export of services', Section 7, which deals with inter-state supply, especially sub-section (5) thereof, Section 13 which stipulates the place of supply of services where location of supplier or location of recipient is outside India, especially sub-section (4) thereof and Section 16 dealing with zero rated supply.

25. The Authority is admittedly located within the domestic area of the Coimbatore Airport and thus the supplier of services is located in India satisfying Section 2(6)(i) of the Act. The recipient of services is the petitioner, a DFA, located in the customs area of the Airport, which is outside the territory of India as per Section 2(4) defining customs frontiers of India and thus the recipient of services is located outside India as per Section 2(6)(ii).

26. Likewise, the place of supply of services, being DFA, is outside India in tune with Section 2(6)(iii). Section 13(4) states that the place of supply of services, in a case where the location of the supplier or a location of the recipient is



outside India shall be the place where the immovable property is located or intended to be located. The DFA being in the customs tariff area is thus, admittedly, located outside India.

27. The payment for the services is received in convertible foreign exchange, as the concession fee is paid to AAI in US dollars (USD) in terms of Clause 10.5.5 of the agreement extracted below:

'10.5 Payment of Concession Fee

10.5.5. All payments towards Concession Fee, payable by the Concessionaire to the Authority, shall be in US DOLLARS.'

28. Thus Section 2(6)(iv) also stands satisfied. Section 2(6)(v) requires that neither the supplier nor the recipient should be establishments of a distinct entity which is not the case in this matter. Thus all relevant stipulations in Section 2(6) are satisfied.

29. As to whether customs area is outside the domestic frontiers of India, one may refer to Section 2(4) of the IGST Act which, in turn, refers to Section 2(11) of the Customs Act, 1962 which includes any area in which goods are kept before clearance by customs authority. Clearance of goods from customs for home consumption is set out under Section 68 of the Customs Act and in this case, the question of clearance does not arise, as the DFA is located beyond the customs frontier. Therefore, the location of the DFA is admittedly outside the territory of India, according to the petitioner.

30. Learned counsel for the petitioner relies on the following judgments:

- i. Hotel Ashoka V. Assistant Commissioner ((2017) 276 ELT 433)
- ii. A-1 Cuisines V. Union of India ((2019) 60 GSTR 321) (Bom.)
- iii. Sandeep Patil V. Union of India (2020 (372) ELT 94) (Bom.)
- iv. Sandeep Patil V. Union of India ((2020) 76 GSTR 332(Bom.)
- v. CIAL Duty Free and Retail Services Ltd. V. Union of India ((2021) 84 GSTR 135)
- vi. Flemingo Duty Free Shop Pvt. Ltd. V. Union of India (W.P.No.4055 of 2019, order dated 30.03.2021)
- vii. Flemingo Duty Free Shop Pvt. Ltd. V. Union of India (W.P. (MD) No.2129 of 2018, order dated 11.03.2021)

31. Per contra, the argument of the Department is that the supply to DFS constitutes inter-state supply, within the meaning of Section 7(5)(a). It is pointed out that where the supply is



located in India (as in the case of AAI here) and the place of supply is outside India (DFA being beyond customs frontier), such transaction shall be treated to be a supply of goods or services or both, in the course of inter-state trade or commerce. Thus, according to the revenue, the petitioner will not be entitled to the benefit of zero rated sale under Section 16, as claimed.

32. In fact, the Madhya Pradesh High Court in Vasu Clothing V. Union of India ((2019) 61 GSTR 144 (MP), has dealt with this very issue holding that supply effected to a DFS is liable to GST. An SLP is stated to be pending as against the aforesaid decision.

33. In reply, the petitioner states that a transaction of the present nature is not contemplated under Section 7 at all. The provisions of Sections 2 and 16 are specific to export and thus would be the appropriate provisions to be applied. If the revenue's case were to be accepted, there would be no situation where an exporter would ever receive benefit under Section 16, rendering Sections 2(6) and 16, otiose.

34. Article 286 of the Constitution of India places certain restrictions on the States' power to tax and reads as follows:

286. Restrictions as to imposition of tax on the sale or purchase of goods

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place

(a) outside the State; or

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India

(2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1)

(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter State trade or commerce; or



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(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub clause (b), sub clause (c) or sub clause (d) of clause 29 A of Article 366, be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify.

35. The overriding position is that no State shall impose or authorize imposition of tax where supply takes place outside the State or, in course of import/export of goods into or out of the territory of India. Thus, and by application of first principles, the sale of the goods from a location outside the State, (the DFS being outside the State) and in the course of import and export of goods in and out of the territory out of India, stands outside the purview of taxation.

36. In this context, useful reference may be made to the definition of customs frontier in Section 2 (4) of the IGST Act read with Section 2 (11) of the Customs Act, to refer to the 'frontiers of India' in the context of clearance of Goods for home consumption by the Customs Authority, both of which are extracted below:

2. In this Act, unless the context otherwise requires,--

(4) 'customs frontiers of India' means the limits of a customs area as defined in section 2 of the Customs Act, 1962;

Section 2. Definitions. -

(11) 'customs area' means the area of a customs station 14 [or a warehouse] and includes any area in which imported goods or export goods are ordinarily kept before clearance by Customs Authorities;

37. A Constitution Bench of the Hon'ble Supreme in the Case of Hotel Ashoka (supra) dealt specifically with the taxability of sale by a DFS. The facts are akin to those in the present case, and the conclusions, at para 11,17, 18, 20, 21 & 22 in favour of the assessee, are extracted below:

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11. He further submitted that the learned Single Judge as well as the Division Bench of the High Court ought not to have passed orders against the Appellant as the Appellant had not exhausted equally efficacious alternative statutory remedy. He submitted that the issue involved in the litigation had already been

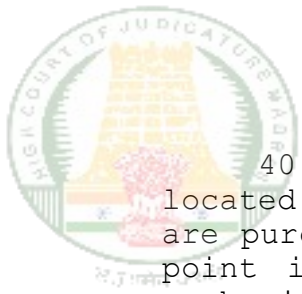


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decided by this Court and other High Courts and the legal position was so clear that the Appellant ought not to have been asked to exhaust alternative statutory remedy. He submitted that when facts were not in dispute and the law had been settled by this Court in several other cases, it was not proper on the part of the learned Single Judge to dispose of the petition only on the ground that the alternative remedy had not been exhausted. He also submitted that the Division Bench also committed an error by confirming the order passed by the learned Single Judge of the High Court. So as to substantiate his submission, the Learned Counsel relied upon several judgments including the judgments delivered in the cases of State of Travancore-Cochin and Ors. v. Bombay Company Ltd. Alleppey AIR 1952 SC 366, State of Travancore-Cochin and Ors. v. Shanmugha Vilas Cashew nut Factory Quilon MANU/SC/0096/1953 : AIR 1953 SC 333, J.V. Gokal and Company (Private) Ltd. v. Assistant Collector of Sales Tax (Inspection) and Ors. MANU/SC/0269/1960 : AIR 1960 SC 595 and in Kiran Spinning Mills v. Collector of Customs MANU/SC/1281/1999 : AIR 2000 SC 3448.

17. In our opinion, the facts stated by the counsel are not much in dispute.

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.



40. The admitted facts in this case are that the DFS is located beyond the customs frontier and goods stocked in the DFS are purchased by customers enroute to destinations abroad. At no point in time are the goods subject to customs clearance. In such circumstances, I am of the categoric view that there can be no liability to GST in respect of the same. Reliance upon the provisions of Section 7 (5)(a) is misconceived in light of the categoric mandate of Article 286 of the Constitution of India.

41. Petitioner also relies upon an illustration from the website of the Bombay Chartered Accountants Society that, according to it, illustrates the difference between 'export' and 'inter-state supply' under Section 7(5)(a). The illustration is extracted below:

Chamunda Traders in Maharashtra receives an order from Queens Associates in London to deliver 100 cell phones at Maheshwari Dealers in Maharashtra. On application of section 10(1)(b) place of supply will be London. The question arises will this transaction be taxed even if the place of supply is London?

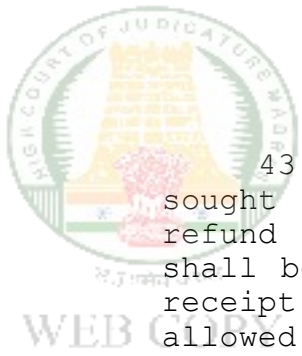
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First, we need to understand whether the transaction between Chamunda Traders and Queens Associates will be considered as Export? As per section 16, export of goods is a "Zero Rated Supply" and tax need not be levied on the same.

As per section 2(5), "export of goods" means taking goods out of India to a place outside India. In our case, as goods are not moving out of India hence it cannot be termed as exports.

Section 7(5)(a) states that supply of goods or services or both when the supplier is located in India and the place of supply is outside India shall be treated to be a supply of goods or services or both in the course of inter-state trade or commerce.

42. The reference is to the concept of 'bill-to' and 'ship-to' as recognised under the GST regime. In such cases, supply is deemed to be outside the Country notwithstanding that the documentation in question may refer to supply within the Country. In any event, one need not take recourse to this position in the present case, as, admittedly, the DFS is located in the customs frontier only.



43. In light of the discussion as above, declaration as sought for is granted. The petitioner is entitled to claim refund of GST paid thus far and such claim, if and when made, shall be settled by the authorities, within four (4) weeks from receipt thereof by the authorities. These writ petitions are allowed.

Sd/-
Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

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To

1. Principal Chief Commissioner of GST & Central Excise
26/1, Uthamar Gandhi Rd, Thousand Lights West,
Nungambakkam, Chennai, Tamil Nadu - 600 034.
2. The Commissioner of State Taxes,
Ezhilagam, Chennai - 600 005.
3. The Joint Commissioner (CT),
Salem Division, Commercial Taxes Building,
Fort Main Road, Salem - 636 001.
4. Airport Authority of India,
Coimbatore International Airport,
Coimbatore - 641 014.
5. Assistant Commissioner, Peelamedu,
South Assessment Circle, Coimbatore.
6. Commissioner of GST, Central GST Office,
Nadar Colony, Ramanathapuram, Coimbatore - 611 019.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.7158

+1cc to M/s.J.Narayanasamy, Advocate, S.R.No.7787

W.P. Nos.35517 and 35521 of 2019
and WMP. No.36360 of 2019

SR-II (CO)
UMA (05/07/2022)