

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP NO. 20 OF 2018 (O&M)

RESERVED ON : 15.12.2023

PRONOUNCED ON: 25.01.2024

M/s Flemingo Duty Free Shop Private LimitedPetitioner

Versus

Union of India and others

....Respondents

CORAM : HON'BLE MR. JUSTICE G. S. SANDHAWALIA

HON'BLE MS. JUSTICE LAPITA BANERJI

Present : Mr. V. Sridharan, Senior Advocate with
Mr. Prakash Shah, Advocate and
Mr. Pawan Kumar Pahwa, Advocate and
Mr. Hrithik Chaudhary, Advocate,
For the petitioner.

Mr. Sourabh Goel, Senior Standing Counsel,
For respondents No.1, 5 and 8.

Mr. Chetan Mittal, Senior Advocate with
Mr. Vivek Singla, Advocate and
Mr. Himanshu Gupta, Advocate,
For respondents No.3 and 4.

LAPITA BANERJI, J.

1. The petitioner is a company engaged in the business of operation of Duty Free Shops (hereinafter referred to as "DFS") at various airports including Sri Guru Ram Dass Jee International Airport at Amritsar. The petitioner entered into a **Concession Agreement** dated April 18, 2016 with Airports Authority of India/respondent No.3 (hereinafter referred to as "AAI"), for operation of DFSs, both at the arrival and departure zones of Amritsar airport.

2. Under the agreement, Airport Director, AAI/respondent No.4 on behalf of respondent No.3/AAI was to raise monthly invoices towards

the minimum guarantee/revenue share at the DFS which respondent No.4 duly did under the nomenclature of “*Licence Fee*”. The petitioner was granted a special warehouse license by the jurisdictional Commissioner of Customs under 58-A of the Customs Act, 1962 (hereinafter referred to as “the Custom Act) for storage of duty free goods to be sold from DFS. It is the petitioner’s case that no goods and/or service tax under The Central Goods and Service Tax Act, 2017 (hereinafter referred to as “CGST Act”) or The Punjab Goods and Service Tax, 2017 (hereinafter referred to as “PGST Act”) could be recovered from the petitioner. The petitioner, *inter-alia*, claimed for refund of Rs.40,71,047.79 (Rupees Forty Lakh Seventy One Thousand Forty Seven and Seventy Nine Paise only) collected by respondents No.3 and 4 on wrongful application of CGST Act, the Integrated Goods and Service Tax Act, 2017 (hereinafter referred to as “the IGST Act”) and PGST Act. The petitioner also prayed for a writ of Mandamus declaring that the aforesaid taxes could not be claimed by the authorities/respondents either on account of ‘*Goods*’ or on account of ‘*Services*’. The petitioner was not required to pay anything over and above the sum stipulated in the **Concession Agreement**. Respondents No.3 and 4 contended that the amount that has been paid by the said respondents to respondent No.1 has to be reimbursed to respondent No.3 by the petitioner and thereafter refund may be claimed from Union of India/respondent No.1 by the petitioner in accordance with law.

3. It is the case of Union of India/respondent No.1 that refund, if any, should be claimed by the petitioner company from Respondent No.1, since Respondents No.3 and 4 deposited the CGST and SGST on behalf of the petitioner, the same could not be refunded directly to respondents No.3 and 4.

4. Mr. Mittal, learned Senior Advocate appearing for respondents No.3 and 4 argued that a sum of Rs.3,83,38,993/- has been paid by the said respondents to the respondent No.1 on account of GST for the bills raised between November 2017 and September 30, 2021. The said facts will appear from a perusal of statements made in CM-4399-CWP-2021 dated 07.03.2023.

5. The petitioner stopped paying the GST amount for ‘services’ to respondent No.1 from November 2017. Despite the fact that respondents No.3 and 4 paid the said amount the petitioner is refusing to reimburse them causing continuous loss to the public exchequer.

6. By an interim order dated January 04, 2018 the Hon’ble Co-ordinate Bench directed as under :

“xxx

We find that the aforementioned argument of the petitioner, prima facie, has force and substance. In view of the matter, the respondents are restrained from interfering with the functioning of petitioner’s Arrival and Departure Duty Free Shops operated at Sri Guru Ram Dass Jee International Airport, Amritsar and levying any tax under the Central Goods and Service Tax Act, 2017, Integrated Goods and Services Tax Act, 2017, Punjab Goods and Service Tax Act, 2017 and the Rules framed thereunder but in order to protect the interest of affected respondents, we impose the following conditions :

- 1. The petitioner shall undertake to submit an indemnity bond to respondents No.3 and 4 equivalent of the amount of the guarantee viz-a-viz the sales (GST) portion of every month;*
- 2. The petitioner shall also furnish 25% of the aforementioned amount (GST) as Bank Guarantee within a period of 15 days of the receipt of invoices every month.*

Needless to state that if the aforementioned conditions are not fulfilled, the interim stay granted in the aforementioned terms shall stand automatically vacated.”

7. By a subsequent order dated April 30, 2018 another Hon'ble co-ordinate Bench did not vary the interim order for the reason that the protection was only towards the petitioner's GST liability and the respondents were free to take any action on any other score including the termination of licence/arrangement. It was, *inter-alia*, recorded as under :

“ Counter affidavit filed on behalf of respondents No.3 and 4 is taken on record.

Learned counsel appearing on behalf of respondents state that the interim order passed on 04.01.2018 is causing the respondents considerable prejudice. They further allege that the interim order leaves the respondents without any substantial protection in the event of the petitioner's losing the writ petition and not paying the amount.

Their further grievance is that they did not get any opportunity of being heard before the drastic interim order was passed during the vacation and only a few days before the term reopened. They therefore oppose any application for adjournment.

We agree that the interim order does not protect the revenue totally. We however intend granting the petitioner's an opportunity of atleast filing an affidavit in reply.

The apprehension that the petitioner would wrongly contend that the interim order protects them against any coercive action for any amount due and payable is not well founded. The interim order only concerns the GST portion. Even the learned counsel appearing on behalf of the petitioner rightly does not contend otherwise. It is clear to us that the protection is only regarding the petitioner's liability towards GST. The respondents or any of them are entitled to take any other action including for termination of the licence/agreement for any other claims that they may have.

The grievance that in the event of this order being vacated or in the event of petitioner losing the matter finally, the respondents would be adversely affected inter-alia on account of loss of interest can always be taken care of by the Court in the further or final order. In fact in the event of the order being vacated or the petition being dismissed an order for interest would normally follow.

The application in so far as it seeks the impleadment of certain authorities/parties is allowed. Notice shall be issued to the newly added respondents as well.

Adjourned to 21.05.2018.

It is agreed that even if the petition is not decided the application qua vacation or modification of the interim order will be decided on the next date.

Copy of the order be given under the signatures of Bench Secretary.”

8. By orders dated July 24, 2018, two Hon'ble Judges of the Division Bench differed and it was Rajesh Bindal, J. who had opined as under:

“xxx

Learned counsel for respondents No.3 and 4 submitted that the Airports Authority of India (in short 'the Authority') is depositing GST on the licence fee with the Department regularly, whereas the petitioner has been given concession of merely furnishing bank guarantee to the extent of 25% of the amount and indemnity bond of the total amount of GST.

He further submitted that the agreement with the concessionaire clearly provided that any tax leviable shall be the responsibility of the licensee. After application of GST, the licensee had the option to renegotiate or to exit the agreement. The proposal of the petitioner to renegotiate the revenue share was not accepted by the Authority.

Learned counsel for respondents No.1, 5 and 6/Department submitted that the Central Board of Indirect Taxes and Customs has taken a decision on July 20, 2018 clarifying that GST is leviable on the licence fee of the Duty Free Shops situated on the Airports. He seeks time to file affidavit.

After hearing learned counsel for the parties and keeping in view the aforesaid developments, we modify the earlier interim orders, while directing the petitioner to deposit the amount of GST with the Authority and the amount so deposited shall be retained by the Authority in a separate account so as to be appropriated in terms of the final decision in the writ petition. In case the petitioner is held liable to pay the amount, the same shall be deposited with the Department, whereas in case the transaction is not found to be taxable, the amount will be refunded by the Authority to the petitioner.

Xxx”

9. Therefore, Bindal, J., was of the opinion that earlier interim orders should be modified and the petitioner should be directed to deposit the amount of GST with respondents No.3 and 4 which should be retained in a separate account and the same would be appropriated in accordance with final decision in the writ petition. In case the petitioner was liable to pay the amount, the same would be deposited with the department

whereas in case the transaction was found to be not taxable, the same was to be refunded to the petitioner.

10. A divergent view was taken by Amit Rawal, J. by an order of the even date. He referred to the Hon'ble Supreme Court's decision in SLP No.8614 of 2018 to come to the conclusion that the SLP containing similar issues were dismissed on the ground that the same were filed against the interim orders. He held as under :

“xxx

During all this period, the matter remained pending and only an application under Article 226 (3) of the Constitution of India has been preferred by respondents No.1 and 2, but not by respondent No.3. There is no change in the circumstances from the date of passing of the interim order and during the pendency of the writ petition when taken up from time to time.

I also cannot remain unmindful of the fact that vide C.M No.8816-CWP of 2018, prayer was made for disposal of the writ petition but during the course of hearing of the same, learned counsel confined prayer only for a direction to the Board to decide with regard to payment of GST as vide letter dated 27.03.2018 (Annexure A-7), Assistant Commissioner of State Tax Local Goods & Service Tax 260-Mangalore, sanctioned refund of GST on 'Licence Fee'.

In such circumstances, with all humility, I beg to differ with the view expressed by my brother Judge for modifying the interim order as it would tantamount to overreaching the order of the Hon'ble Supreme Court and as well as reviewing of the order in the absence of any application.”

11. Due to said divergence of opinions, the matter was referred to the Hon'ble Third Judge. The Hon'ble Justice Jaswant Singh, third Judge was of the view that as per the law cited by both the sides, the petitioner was not liable to pay taxes on **supply of goods**, however, the petitioner was liable to pay taxes on **Services** when availed from the respondent/AAI. The petitioner was entitled to Input Tax Credit (hereinafter referred to as “ITC”) on the GST paid on **Services** availed. The cumulative credit could be used for payment of tax or refund could be applied for.

12. We observed that the petitioner was not willing to pay tax on **Services** on the ground that it was entitled to refund on account of **supply of goods**. Even though the petitioner was entitled to 'ITC' he would still be liable to pay tax on the **Services** availed. The petitioner had not been paying taxes to respondents No.3 and 4 due to interim orders passed by the Court but respondents No.3 and 4 were depositing the same with the department/ authorities being the service provider. Therefore, the Hon'ble Third Judge did not modify the order dated January 04, 2018, but clarified that the petitioner would be liable to pay interest on the withheld amounts of GST on **Services** in terms of interim order dated April 30, 2018. The relevant portion of said order dated July 16, 2021 is reproduced hereinafter :

“xxx

A Division Bench of this Court vide order dated 04.01.2018 granted ex-parte interim stay restraining the Respondents from collecting GST and further directed the Petitioner to furnish indemnity bond equivalent of the amount of the guarantee viz-a-viz the sales portion of every month and furnish 25% of GST as bank guarantee. As per Airport Authority, they have not collected GST on services from Petitioner on account of orders of this Court, however, have deposited with GST authorities. Deposit of tax without being collected from Petitioner is causing irreparable loss in terms of blocking of funds.

As per law cited by both sides, the Petitioner is not liable to pay tax on supply of goods, however, is liable to pay tax on services availed from Respondent/Airport Authority. The Petitioner is entitled to Input Tax Credit of GST paid on services availed and accumulated credit can be used for the payment of tax or refund may be applied, as the case may be. The Petitioner does not want to pay tax on the ground that they are entitled to refund on account of export of goods. As per judgments relied upon by both sides, the Petitioner though would be entitled to ITC still is liable to pay tax on services availed, however, the Petitioner on account of interim orders of this Court is not paying tax to Respondents No.3 and 4, who are depositing with officials Respondents being service provider.

10. Both sides concede the main controversy more or less stands settled by different High Courts, thus this Court is of the opinion that there seems no necessity to modify order

dated 4.1.2018 at this belated stage, and accordingly agree with the view expressed by Amit Rawal (J). However, in view of changed facts and circumstances and pendency of Petition for quite long time it would be appropriate that if main Petition itself is finally heard and disposed of at the earliest. Needless to point out that the petitioner company would be liable to pay interest on the withheld amounts of GST on Services in terms of interim order dated 30.04.2018. Xxx”

13. Thereafter, several adjournments have been granted to the parties since the learned counsel on behalf of respondents No.1, 5 and 6 sought time to get necessary instructions as to whether the Union of India/ Respondents No.1 and 5 were ready to refund the amount deposited by respondents No.3 and 4 directly to respondent No.3 which he finally submitted that the respondent No.1 was unable to do.

14. By an order dated July 13, 2023 the Hon’ble Co-ordinate Bench recorded that in Civil Appeal Diary No.24366 of 2022, **(Commissioner of CGST and Central Excise Mumbai East Vs. Flemingo Travel Retail Ltd.)** decided on 10.04.2023 the Hon’ble Supreme Court held that no indirect tax could be imposed upon the duty free shops at the airports. The Hon’ble Apex Court noticed the decision of the Division Bench of Bombay High Court in **Sandeep Patil and others v. Union of India and others** reported as 2019 (31) GSTL 398 and the decision of Learned Single Judge of the Kerala High Court in **CIAL Duty Free and Retail Services Limited v. Union of India** in CWP (C) No.12274 of 2020 decided on 22.09.2020. Referring to the aforesaid judgments and Article 286 of the Constitution of India, it reiterated the fact that duty free shops whether in arrival or departure terminals were outside the custom frontiers of indirect tax burden and any such levy would be unconstitutional. Therefore, if any such 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 objections including that of limitation.

15. When the matter came up for hearing on December 15, 2023 it was vehemently argued by the learned counsel appearing on behalf of the petitioner that when goods were brought from foreign countries by any party and kept in bonded warehouses and transferred to duty free shops at international airports it could not be contended that the goods have crossed the custom frontiers. Reliance was placed on ***Hotel Ashoka v. Assistant Commissioner of Commercial Taxes*** reported as 2012 (278) ELT 433 (SC) by the Apex Court in its order dated 10.04.2023 and in the case of ***A-1 Cuisines Private Limited v. Union of India*** reported as 2019 (22) GSTL 326 (Bombay) and Central Government order in the case of ***Aarish Altaf Tinwala v. Commissioner of Customs (Airport), Mumbai*** in Writ Petition (s) (Criminal) No.97 of 2019. There is no dispute with regard to the said proposition.

16. Learned counsel for the petitioner also placed substantial reliance on ***M/s Flemingo Duty Free Shop Private Limited v. Union of India and another*** in WP No.4055 of 2018 and WP (MD) No.2129 of 2018, passed by the learned Single Judge of the Madras High Court to contend that the refund of the GST should be paid directly by respondents No.1 and 5 to respondents No. 3 and 4.

17. In WP No.4055 of 2018 also, it has been held that the petitioner shall pay GST on input services including concession fee to the respondent No.4 and claim ITC on the entire tax amount and thereafter claim refund of the same by following the procedure as prescribed *inter alia* under Sections 54 (3) of the CGST Act 2017 read with Rule 89 of

CGST Rules, 2017. Learned Single Judge in WP No.4055 of 2018 has also relied on paragraph 37 of **Sandeep Patil's** case (supra).

18. It is pertinent to refer paragraph 37 of **Sandeep Patil's** case (supra). In the said paragraph it was clearly held that the petitioners may be entitled to refund of ITC and no prejudice will be caused to them if they first pay GST on the **Services** provided to Duty Free Shops (DFSs) by the Airport Authorities and then take ITC of the entire tax amount and thereafter claim refund of the same by following the said procedure.

19. In this context, paragraph 37 of **Sandip Patil's** case (supra) is reproduced hereinafter :

“xxx

37. Hence, writ petition bearing W.P No.1511 of 2019 succeeds. The impugned order dated 10th January, 2019 and the impugned show cause notices are quashed and set aside. So far as Writ Petition No.1535 of 2019 is concerned, we refrain from issuing any declaration since the Petitioner is held to be entitled for refund of ITC and as such no prejudice will be caused to them, if they would first pay GST on the services provided to DFSs by MIAL and take ITC of the entire tax amount, and thereafter claim refund of the same by following the procedure contained in Rule 89.”

Xxx”

20. Three types of transactions were held to be issue in **Sandeep Patil's** case:-

- i) Sales by Duty Free Shops to departing passengers;
- ii) Sales by Duty Free Shops to Arriving passengers and
- iii) Receipt of input services by Duty Free Shops.

21. The first two issues were decided in favour of DFS and third issue was not decided in favour of DFS. The writ petition dealing with first two issues was pertaining to WP No.1181 of 2018 succeeded and the impugned Show Cause Notices were quashed. However, as far as the third issue was concerned, as raised in WP No.1535 of 2019, it was held that no declaration was made since the petitioner was entitled to refund of

ITC and no prejudice would be caused to them if DFS first paid GST on the **Services** provided to them by the Airport Authorities and then take the benefit of ITC on the entire amount and thereafter claim refund for the same.

22. It is also relevant to refer to paragraph 33 of **CIAL's** case (supra) for clarification of the issues. The same is reproduced herein below :

“xxx

33. *In W.P (C) No.6850 of 2018, I refrain myself from giving any declaration as sought qua accessibility of GST at Calicut International Airport but since this Court had granted the stay, which is operational during the pendency of the present writ petition, no GST is payable by respondent No.4 Airport Authority and no useful purpose would be served in directing Respondents No.1 and 3 to recover any GST on concession fee till 30.06.2020, which Respondent No.4 will seek to recover from the petitioner since as per judgment dated 07.10.2019, the supply of goods by DFSs to outgoing passengers is export of goods under IGST and zero rated supply, it would entitle the petitioner (s) to claim 100% of ITC and refund thereof effective from 01.07.2020 onwards. As per the reasoning assigned in para 37 of the judgment referred to above in Sandeep Patil the petitioner shall pay the GST on input services including Concession Fee to Respondent No.4 and claim ITC of the entire tax amount and thereafter claim refund of the same by following the procedure prescribed under Section 54 (3) of the Central Goods and Services Tax Act, 2017 and Kerala Goods and Services Tax Act, 2017 read with Rule 89 of Central Goods and Services Tax Rules, 2017 and Kerala Goods and Services Tax Rules, 2017.”*

23. Before parting with the discussion, it is important to refer to the relevant clauses in the **Concession Agreement** whereby the petitioner/concessionaire has agreed to pay the concession fee, exclusive of all the taxes as per the following clauses of the Agreement:-

“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 obligations 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 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 respective income shall be borne by the respective Parties.

10.5 Payment of Concession Fee

10.5.1 The Concession Fee (along with any applicable service tax which may be payable) payable under the provisions of this Article 10 shall be due and payable as set out in Clauses 10.5.2, 10.5.3 and 10.5.4.

10.5.2 The payment of Concession Fee shall commence from the Rent commencement Date.

10.5.3 Irrespective of the Authority raising an invoice, the Monthly Concession Fee (MCF) (along with any applicable service tax which may be payable) in respect of the Location shall be paid in advance on the 20th (twentieth) day of every Month during the Concession Term.

10.5.4 All payments towards Concession Fee, payable by the Concessionaire to the Authority, shall be by way of electronic fund transfer through Real Time Gross Settlement (RTGS) system to provide for real time inter-bank payment in favour of such account as may be prescribed by the Authority from time to time.

10.5.5 All payments towards Concession Fee, payable by the Concessionaire to the Authority, shall be in Indian Rupees.”

24. In the light of observations made hereinabove and the interim orders dated January 04, 2018 and April 30, 2018 passed by Hon’ble Third Judge and the terms of the concession agreement we are of the considered opinion that the petitioner should first pay the respondents No.3 and 4 and then claim ITC and/or subsequent refund, if any, from respondents No.1, 5 and 6.

25. Therefore, the petitioner is bound to pay the **GST** on the **Services** provided by the respondents No.3 not only in accordance with the case laws discussed hereinabove but also due to the binding concession agreement between the petitioner and the respondents No.3 and 4.

26. In view of the discussions made hereinabove, it is directed that the petitioner will reimburse the sum of Rs.3,83,38,993/- to the respondents No.3 and 4 within a period of four weeks from date of this order, along with interest as the order dated April 30, 2018 also makes it clear that the petitioner is liable to pay GST along with interest if it does not succeed in the writ petition. It is directed that interest shall be paid @ 8% per annum from the date of deposits made by Respondents No.3 and 4 till such time the entire reimbursement is done to them. The petitioner shall make necessary applications in accordance with law for claiming ITC and/or refund of the amount reimbursed to respondents No.3 and 4 and other amounts refundable and the same shall be duly considered by respondents No.1, 5 and 6 within eight weeks from the date of the order.

27. With the directions aforesaid, CWP-20 of 2018 along with all the connected applications are disposed of.

(G. S. SANDHAWALIA)
JUDGE

(LAPITA BANERJI)
JUDGE

JANUARY 25th, 2024
Shalini/vandana

Whether speaking/reasoned:	Yes
Whether reportable:	No