IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 8 OF 2019
IN
PUBLIC INTEREST LITIGATION NO. 14 OF 2019

Sandeep Patil. ..Applicant/Petitioner.
Versus
Union of India and Others. ..Respondents.

WITH
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1511 OF 2019

Flemingo Travel Retail Limited & Anr. ..Petitioners.
Versus
Union of India and Others. ..Respondents.

WITH
WRIT PETITION NO. 1535 OF 2019

Flemingo Travel Retail Limited & Anr. ..Petitioners.
Versus
Union of India and Others. ..Respondents.

Advocates in Crim. Application No. 8 of 2019 :
Mr. Annop U. Patil for the Applicant.
Mrs. P. H. Kantharia for Respondent No.1
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Mr. Vikram Nankani, Senior Advocate with Mr. Ashish Kamat, Mr. Abhay Jadeja, Mr. Varun Satiya, Mr. Arun Unnikrishnan i/b Crawford Bayely & Co., for the Petitioner.
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Mr V. A. Sonpal, Special counsel with Mr. Himanshu Takke, Ms. Jyoti Chavan AGP for the Respondent-State.
Mr. Vijay Jain i/b Mr. Sriram Sridharan for Respondent No. 5.

Coram : RANJIT MORE &
SMT. BHARATI H. DANGRE, JJ.

Arguments heard on : **August 5, 2019**.

Judgment pronounced on : **October 7, 2019**.

Judgment [Per Ranjit More, J.] :

1. The criminal application bearing No.8 of 2019 is filed by the original petitioner seeking review of the order passed by us on 6th February 2019 in Criminal Public Interest Litigation No.14 of 2019. By the said order, we have dismissed the said PIL. Review is sought by the Applicant-Petitioner placing heavy reliance on an adjudication order passed by the Deputy Commissioner of Sales Tax, being Order-in-Original No. DC-E-636 / LTU-3 / Order of GST Refund Application / 2018-19 / B-355 Mumbai dated 10th January 2019. By the said order, the Deputy Commissioner of Sales Tax has denied to refund the input tax credit (for short "ITC") pursuant to sale of duty free goods from the duty free shops (for short, DFS") at the departure area of airport.

2. The Petitioners in Writ Petition No.1511 of 2019 have taken exception to the very same adjudication order passed by the Deputy Commissioner of Sales Tax. The Petitioners in Writ Petition No.1535 of 2019 are seeking a declaration that the consideration being paid by it to Mumbai

International Airport Ltd (MIAL) under a concession agreement dated 17th February 2014 towards the minimum guaranteed fees/ concession fees for grant of rights and use of licensed premises of duty free shops in the departure or arrival area of international airport, is not liable to GST and hence the MIAL is not entitled to collect GST from the Petitioner.

3. Thus, all these matters [namely, two writ petitions as well as criminal application] pertain to duty free shops of M/ s. Flemingo Travel Retail Limited, who is the Applicant in above Criminal Application and the Petitioners in other two writ petitions. There is no dispute that duty free shops are situated in international airport at Mumbai at the international arrival and international departure area, after crossing immigration. There is no dispute on the fact that these duty free shops are situated beyond the customs frontiers of India.

4. The common issue raised in above writ petitions and the PIL is whether the DFSs at MIAL can be saddled with burden of taxes or restrictions despite the provisions of Article 286 of the Constitution of India and the ratio laid down by the Apex Court in the matter of DFSs situated at Bangalore International Airport in the case of *Indian Tourist Development*

Corp. Ltd v. CCT [(2012) 3 SCC 204].

5. All the parties were heard at length. The Respondent-State and the Union of India have opposed the writ petitions. We have carefully perused the records and the statutory provisions.

6. Following facts have emerged from the record. :

(a) The Petitioner in DFSs sells goods to international passengers, who are either leaving India (departing passengers) or arriving into India (arriving passengers). The goods – generally chocolates, perfumes, cosmetics, cigarettes, alcohol etc. are primarily imported or occasionally procured from SEZ units in India (hereinafter collectively referred to as 'the warehoused goods'). However, bulk of the sales (almost 98%) are of the imported / warehoused goods, before they cross customs frontiers or barriers. Further goods procured from domestic market were never sold to the arriving passengers.

(b) The DFSs also receive various input services such as leave and licence arrangements of areas/space, maintenance services, CHA services, professional services, etc., from different service providers located inside or outside the DFS area.

(c) There are three types of transactions which are in issue -

(I) Sales by DFSs to departing passengers.

(ii) Sales by DFSs to arriving passengers.

(iii) Receipt of input services by DFSs.

(d) The words “import” and “export” are defined in the Customs Act, 1962. These words are identically defined in the Integrated Goods and Services Tax Act, 2017 (for short, “the CGST Act”).

(e) DFSs are located in customs station as defined in section 2(13) of the Customs Act, 1962. The Petitioner – DFS has been issued a special warehouse licence under section 58A of the Customs Act. Both DFS and special warehouse are part of the ‘customs area’ as defined in the Customs Act. The special warehouse, wherein the warehoused goods are stored before its sale from the DFS is unique and different from the other normal warehouses wherein other importers store their goods. It is for this reason that the special warehouse license is granted to the Petitioner under section 58A of the Customs Act, which is unique to the DFS business in India.

(f) Accordingly, when the goods are imported by the petitioner into India from a place outside India, the company files a bill of entry for warehousing under Section 46 of the Customs Act, 1962. Along with the bill of entry, company executes a bond and is issued a ‘space Certificate’, for physical storage of the goods into a customs bonded warehouse / special warehouse as per sections 59 and 60 of the Customs Act, 1962.

(g) When the goods move from special warehouse to DFSs, which as aforesaid, are located in a custom station and hence, is a custom area, the proper officer under the Customs Act, 1962 permits the same to be removed under physical supervision.

(h) Thus, the imported goods continue to be within the custom area and are not removed for home consumption as provided for under section 68 of the Customs Act, which is by filing an ex-bond bill of entry for clearance for home consumption on payment of duty. It, therefore, follows that all sales and supplies take place from or within the custom area.

(i) We have seen specimen Invoice issued by DFS, at the time of sale of goods to outbound passengers, which is stated to be signed by outbound passenger and cashier. The said invoice shows that the supply of duty free goods is with a condition that such passenger shall not consume the goods until he lands at the final destination outside India, and further that such passenger shall become owner of the goods only upon reaching the final destination. The declaration printed on the invoices of DFS reads as under-

> *"I am carrying these duty free goods on behalf of Flemingo Travel Retail Limited (Mumbai Duty Free) out of India and undertake not to use/consume these till I land at my destination out of India, where I become owner of these goods."*

(j) In sales from DFS of the Petitioner, the out-bound passenger is under an obligation and compulsion to

carry the goods out of India as a carrier for export. The sales in DFS are undertaken under the supervision of customs authorities, as provided in the Standing Order and Public Notice, which ensures that once the outbound passenger purchases goods, such passenger either boards the aircraft leaving India and if for some reason, such passenger is not able to board the aircraft, the goods have to be returned back to DFS whereupon the sale is declared void and refund is given.

(k) This is further strengthened with the aid of paragraph 4.3 of the Public Notice bearing no. 154/2004 dated 22nd July 2004 relating to Customs Procedures for Operation of DFS, which reads as under-

"4.3 Customs supervision over sales shall be to ensure that persons other than an International passenger do not purchase goods from the DFS and passengers who purchase goods from DFS either board the aircraft leaving India or are cleared duly in the usual manner by customs. This may also be with reference to sale voucher issued."

(l) Since 1st July 2019, undisputedly no tax paid indigenous goods are being procured by the Petitioner and being supplied to outbound international tourist. Notifications issued under section 55 of the CGST/SGST Act are thus not applicable, which is an optional provision applicable only qua the indigenous goods, and not applicable to imported/ warehoused goods sold from or in the customs area. Hence, the provisions of Rule 89 would continue to apply to the refund of ITC for zero

rated supplies of imported/ warehoused goods by the DFS.

(m) Since the Petitioner primarily procures imported goods without payment of duty, question of claiming ITC on imported goods does not arise.

(n) On the input services received by the Petitioner, different service providers charge as well as collect the GST from the Petitioner. The GST so paid, for which the Petitioner receives tax invoices, is available as credit. The Petitioner has two types of sale-export or zero-rated supply to departing passengers and supplies of goods to arriving passengers. Section 16(1) of the Central Goods and Services Tax Act, 2017 provides that every registered person shall be entitled to take credit of input tax charged on any supply of goods or services to him which are used or intended to be used in the course of furtherance of his business. There is no dispute that the input services such as rent and other charges paid towards DFS, warehouse and other premises, maintenance services, CHA Services, Professional Services, etc., received by the Petitioner are used in the course or in furtherance of its business. Hence, credit of entire GST paid on input services is available to the Petitioner under section 16(1) of the CGST Act.

7. The contentions of Respondent-State and the Authority in support of the impugned adjudication order and

the notice are broadly as under. These arguments were adopted by the learned counsel appearing for the Union of India.

(i) It was submitted that writ Petitions are liable to be dismissed in view of alternate remedy available to the Petitioner. It was claimed that the authorities are only enforcing the law and thus there is no violation of Articles 14, 19, 21 and 300A of the Constitution of India.

(ii) It was submitted that although the provision of Article 286 of Constitution of India in relation of a DFS at Bangalore International Airport was considered by the Supreme Court in *Hotel Ashoka (supra), the same* is not relevant in the present context. The Supreme Court in the said case has dealt with a case under VAT and CST laws and not with regard to provisions of GST. There is no event of sale in the course of imports.

(iii) It was further submitted that though the various cases/judgments (of the Supreme Court, High Courts and Tribunals) are in favour of the Petitioner and also concerning the DFSs, the same are not applicable, for the reason that they are in the context of either Customs Act, Service Tax, VAT or COPTA etc., and not directly concerning GST laws.

(iv) It was also submitted that as provided in

Section 1(2) of the CGST Act, the said Act extends to the whole of India and as per Section 1(2) of the MGST Act, it extends to the whole of State of Maharashtra. The DFS is located in Maharashtra limits and within India, since the international Airport itself is in India, and, therefore, the operations of the Petitioner are in 'taxable territory', where supplier and receiver are located in India at the time of supply. The taxable territory is defined in Section 2(109) of the Act as a territory to which the provisions of the Act apply. The non-taxable territory is defined in section 2(79) of the Act, as a territory outside the taxable territory.

(v) It was contended on behalf of the Respondents that though under the Customs Act, 1962, the sale by DFS is treated as 'export', and the bills issued by DFS are treated as shipping bills, the same can not be *ipso facto* applicable under the GST laws. The CGST Act, the MGST Act, the IGST Act, Articles 246A and 279A of the Constitution of India are collectively Code in themselves, and there is no warrant to refer to any past or present statutes or other provisions of the Constitution; the DFS and passengers receiving goods, are located at airport within India. It was urged that In view of Section 19 of the Sale of Goods Act, 1930, the outbound passenger immediately becomes owner of the goods purchased from DFS; thereafter the control of goods to reach outside India no longer remains with the

DFS. The goods are not taken out of India to a place outside India. 'Export' is undertaken by passengers buying goods in the departure area, and not by the DFS.

It was urged that Authority for Advance Ruling in Delhi has held in the case of *Rod Retail Pvt. Limited (supra)* that supply of goods to the international passengers going abroad from DFS is not export but intra-State supply. It was further contended that mere supply of food packets to foreign going passengers has not been treated as export in the matter of *Narang Hotels and Resorts Pvt ltd. v. State of Maharashtra [(2004) 135 STC 289].*

It was claimed that the provisions of CGST Act, MGST Act and IGST Act do not provide that supply in area beyond custom frontiers are not liable for GST or are 'export'. The relevance of custom frontier is different in GST law. Section 7(2) provides that such supply shall be inter-state supply liable to IGST.

(vi) It was further contended that nomenclature Duty-Free Shop does not entitle the Petitioner to be free from entire indirect tax burden under every law. The input tax credit is restricted to the tax borne by the Petitioner only on the value of goods supplied, and other GST paid on services can not be allowed to be given as input tax credit qualifying for refund. The

import of goods for sale at DFS may not attract customs duty since the same is not at all cleared for home consumption, but that does not mean that the same are not liable to GST.

(vii) It was then urged that petitioner's gross supply includes supply to both outgoing and incoming passengers, and even if it is assumed without admitting that Petitioner is entitled to refund, then also, supply to incoming passengers cannot be entitled to refund, notwithstanding the order of Central Government, challenge against which is dismissed by the Supreme Court, wherein it has been held by the Central Government that :

> ''...such goods need to suffer Custom Duty on being exported by DFS and imported by passengers in terms of Section 77 Custom Act 1962",

(viii) Next, it was urged that the issues that tax burden would increase the price of the products and the DFS would not be competitive in International market, are wholly irrelevant.

. To take home their contentions, the learned counsel for the Respondents pressed into service following decisions / cases :

(a) M/s. Deepmani vs. State of Maharashtra (Sale Tax Reference No.9 of 2002);

(b) Burmah Shell Oil Storage and distributing Co. of India Ltd. vs. CTO [(1961) 1 SCR 902];

(c) Madras Marine & Co. vs. State of Madras [(1986) 63 STC 0169 (SC)];

(d) Narang Hotels and Resorts Pvt. Ltd. vs. State of Maharashtra [(2004) 135 STC 289 (Bom)];

(e) Commissioner of Sales Tax vs. M/s. Pure Helium (India) limited [(2012) 49 VST 17];

(f) Commissioner of Sales Tax Maharashtra State vs. Radhasons International (Reference Application No. 46 of 2008);

(g) K. Gopinath Nair vs State of Kerala 1992(4) SCC701, and

(h) Decision of Authority for Advance Rulings in the matter of Rod Retail Private Limited dated 27th March 2018 vide AR No. 01/DAAR/2018 in Application No. 01/DAAR/2017.

8. Before we proceed further, it would be apposite to have a look of Article 286 of the Constitution of India, which reads thus :

“Article 286 – Restrictions as to imposition of tax on the sale or purchase of goods

(1) No law of a State shall impose, or authorize the imposition of a tax on the supply of goods or of services of both, where such supply takes place-

(a) outside the State; or

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

(2) Parliament may bY law formulate principle for determining when a supply of goods or of services or both in any of the ways mentioned in clause(1).”

Thus, the supply made in the course of import into India or in the course of export out of India, can not be subjected to any tax.

8. In a petition under Article 32 of the Constitution of India challenging a reassessment order and demand notice issued by the Respondent Sales Tax Authorities on the ground that the Petitioner was not liable to tax by virtue of Section 46 of the Bombay Sales Tax Act, 1953 read with Article 286 of the Constitution of India, a Constitution Bench (five judges) in *J. V. Gokal & Co. vs CST, [AIR 1960 SC 595]*, quoted with approval the following view taken by Justice S.R. Das, though in relation to "high Seas Sales Transaction", which are made in the course of Imports into India-

> "..... To hold that these sales or purchases do not take place 'in the course of import or export' but are to be regarded as purely ordinary local or home transactions distinct from foreign trade, is to ignore the realities of the situation. Such a construction will permit the imposition of tax by a State over and above the customs duty or export duty levied by Parliament. Such double taxation on the same lot of goods will increase the price of the goods and, in the case of export, may prevent the exporters from competing in the world market and, in the case of import, will put a greater burden on the consumers. This will eventually hamper and prejudicially affect our foreign trade and will bring

> about precisely that calamity which it is the intention and purpose of our Constitution to prevent."

9. The said judgment of the Constitution Bench was subsequently followed by the Supreme Court in *India Tourist Development Corpn. Ltd. Through Hotel Ashoka v. CCT, [(2012) 3 SCC 204*] in the matter of DFSs at international airport at Bengaluru. In that case, the assessment orders passed by the Assistant Commissioner of Commercial Taxes, Bengaluru were challenged in a writ petition before the High Court of Karnataka. The said writ petition was dismissed on the ground of availability of alternate remedy. Writ appeal preferred there-against was also dismissed. However, civil appeal there-against was entertained by the Supreme Court, *inter alia*, on finding that when the legal position is very clear and the law is also in favour of appellant, it would not be in the interest of justice to relegate the appellant to the statutory authorities. Then, the Supreme Court has observed thus :

> "11. So as to substantiate his submission, the learned counsel relied upon several judgments including the judgments delivered in State of Travancore-Cochin v. Bombay Co. Ltd.-AIR 1952 SC 366, State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory – AIR 1953 SC 533, J. V. Gokal & Co.

(p) Ltd. v. CST – AIR 1960 SC 595 and Kiran Spg. Mills v. Collector of Customs-AIR 2000 SC 3448."

17. In our opinion, the facts stated by the counsel are not much in dispute. 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 the 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. Thus, before the goods were imported in the country, they had been sold at the duty-free shops of the appellant.

18. In view of the aforestated factual position and in the light of the legal position stated herein above, it is very clear that no tax on the sale or purchase of goods can be imposed by any State when the transaction of sale or purchase takes place in the course of import of the goods into or export of the goods out of the territory of India. Thus, if any transaction of sale or purchase takes place when the goods are being imported in India or they are being exported from India, no State can impose any tax there on.

20.....Looking to the aforestated legal position, it cannot be disputed that the goods sold at the duty-free shops, owned by the appellant, would be said to have been sold before the goods crossed the customs frontiers of India, as it is not in dispute that the duty-free shops of the appellant situated at the International Airport of Bengaluru are beyond the customs frontiers of India i.e. they are not within the customs frontiers of India.

21. If this is the factual and legal position, in our opinion, looking to the provisions of Article 286 of the Constitution, the State of Karnataka has no right to tax any such transaction which takes place at the duty-free shops owned by the appellant which are not within the customs frontiers of India.

22. Looking to the aforestated simple and factual legal position, in our opinion, it would not be much useful to discuss the judgments which have been referred to by the learned counsel appearing for the appellant. In our opinion, the legal position is so clear that it was not necessary for the learned counsel to refer to any judgment and merely by showing the aforestated factual aspects and legal provisions to the authority concerned, the appellant could have convinced the authority concerned that the sale effected at the duty-free shops of the appellant could not have been taxed by the State of Karnataka.

26. The learned counsel 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 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 customs frontiers of India.
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> 28. Looking to the aforestated clear and settled legal position, we allow the appeal and quash the order of assessment so far as the transactions which are the subject-matter of this litigation are concerned. There shall be no order as to costs."

10. In view of the above two binding precedents, we are *prima facie* of the view that issues raised by the Petitioner have considerable merit, and therefore, we have no hesitation in entertaining these writ petitions notwithstanding the availability of alternate remedy against the impugned order.

11. The Respondents have made an attempt to distinguish all the judgments and orders which are passed from time to time in favour of the Petitioner-DFS by various forums, by contending that the same are not concerning the GST laws. In our view, such approach of the Respondents appears to be *ex-facie* erroneous, moreso when the judgments

on which the Respondents seek to rely, are neither of the GST regime, nor passed in the matters of duty free shops situated at the arrival or departure area of international airports.

12. In *Burmah Shell (supra)* relied upon by the Respondents, petrol/fuel was supplied from a tank located at Dum Dum Airport. This case was followed in *Madras Marine (supra)*. *Narang Hotels (supra)* was on flight kitchen, which was not a bonded warehouse. In *Pure Helium (supra)*, the goods were consumed within the exclusive economic zone, which is part of India, as defined. None of the decisions relied upon by the Respondents, pertain to DFSs. None of these cases relied upon by the Respondents were with regard to 'export' of goods, as the goods are consumed in the aircraft, or do not have a specific foreign destination, where they can be said to be imported. Whereas in the present case, the destination of the goods purchased by the outbound passenger is clearly a foreign destination. The outbound passenger only acts as a carrier on behalf of the DFS, till reaching the final destination in a foreign country.

13. Further, the judgment of a co-ordinate Bench of this

Court in the matter of *Radhasons International (supra)* relied upon by the Respondents, in paragraph 76 thereof clearly shows that the facts therein were distinguishable from the facts in the case judgment of Supreme Court of India in the matter of *M/s. Hotel Ashoka (Indian Tourism Development Corporation Limited) (supra)*.

14. Moreover, the decision of Authority for Advance Rulings in the matter of *Rod Retail Private Limited* dated 27th March 2018 vide AR no. 01/DAAR/2018 in Application No. 01/ DAAR/2017 which is relied upon by the Respondents was thereafter explained by the **Central Board of Indirect Taxes & Customs** ('CBIC') by issuing a clarification dated 29th May 2018 stating that advance ruling in the matter of Rod Retail Private Limited is not applicable to DFS and that the dispensation allowed to the DFS will not be effected in any manner. Further, CBIC also clarified that as per section 103 of Central Goods and Service Tax Act, 2017, this advance ruling applies only to the applicant, i.e. Rod Retail Private Limited, which was not a Duty-Free Shop but a Duty Paid Shop.

15. There is no merit in the submission of the Respondents that although the Customs Act treats the sale at

DFS as export, the same cannot be *ipso facto* applicable under the GST Laws. Paragraph 4 of Circular No. 106/245/2019-GST dated 29th June 2019 issued by the Central Board of Indirect Taxes and Customs..... GST Policy Wing of ministry of Finance, Government of India clearly shows that since the procedure for procurement of imported/warehoused goods is governed by the Customs Act, the procedure and applicable rules as specified under the Customs Act are required to be followed for procurement and supply of such goods. Under Section 2(4) of IGST Act, "the customs frontier" means the limits of customs area as defined in Section 2 of the Customs Act, 1962. **The DFS located in the customs airports and special warehouse will thus form part of the customs area as defined under section 2(11) of the Customs Act.**

16. The Central Government vide order dated 31st August 2018 in *Aarish Altaf Tinwala (F.No. 371/142/B/2018-RA/ 1391)*, inter alia, held that supply of goods from the arrival DFSs is treated as an export by DFSs, and the passenger who buys from DFS and thereafter crosses the customs barrier, files import declaration and becomes importer. This position has been affirmed by the Supreme Court by rejecting the writ

petition filed against this central government order, vide an order dated 10th May 2019 passed in Writ Petition (C) No. 564 of 2019 titled as *Aarish Altaf Tinwala vs. Union of India.*

17. It is pertinent to note that we have held in *Sandeep Patil vs. Union of India & Ors. (Criminal Public Interest Litigation No.14 of 2019)* that sale to the departing passengers amounts to export of goods and DFS is an "exporter".

. The same view has also been taken by the Allahabad High Court in its judgment dated 3rd May 2019 in *Atin Krishna vs. Union of India & ors. (P.I.L. CIVIL NO. 12929 of 2019).* Another co-ordinate Bench in *A-1 Cuisines Private Limited Vs. Union of India (Writ Petition No. 8034 of 2018 , vide judgment dated 28.11.2018)* has taken a similar view so far as the DFSs are concerned. All these judgments draw support from the judgment of the Supreme Court in *Hotel Ashoka (supra)*.

18. We are also convinced in view of Section 5(2) read with Section 19(1) of the Sale of Goods Act, 1930, that the condition of sale/declaration printed on the invoice of DFS, pursuant to signatures by the outbound passenger and cashier, acts as a contract agreeing that the property in the

goods purchased from DFS passes to such outbound passenger only when such outbound passenger lands at the final destination. Section 5(2) and Section 19(1) of the Sale of Goods Act, 1930 read as under-

> "**5. Contract of sale how made-**
> (1) .....
> (2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties."
>
> "**19. Property passes when intended to pass-**
> (1) Where there is a contract for the sale of specific or ascertained goods the Property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."

19. In this context, in fact the judgment of this Court in the matter of *Narang Hotels and Resort Pvt. Ltd. (supra),* which has been relied upon by the Respondents actually supports the case of Petitioner, as seen from the following observations contained therein-

> "115. We may at this stage proceed to consider and find out the place of appropriation of contract in the light of the provisions of the Sale of Goods Act, 1930. It may be noted that exactly when property in goods passes from the seller to the buyer to the buyer depends on the intention of the parties. This intention may, at times, be clearly expressed. .....A contract of sale, like any other contract, is a consensual act in as much as parties are at liberty to settle, amongst them selves, any terms they

may choose.

116. Section 19 attempts to give effect to the elementary principle of the law of contract that the parties may fix the time when the property in the goods shall be treated to have passed. It may be the time of delivery, or the time of payment of price or even the time of the making of contract. It all depends upon the intention of the parties. It is, therefore, the duty of the court to ascertain the intention of the parties and in doing so, they have to be guided by the principles laid down in section 19(2) which provides that for ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

118. In Roe Kim Seing v. Maung Ba Chit, AIR 1935 PC 182, it was held that intention of the parties was the decisive factor as to when the property in goods passes to the purchaser. If the contract is silent, intention has to be gathered from the conduct and circumstances of the case."

20. Section 2(5) of the IGST Act defines "export" to mean "taking goods out of India to a place outside India". In view of the above we are satisfied that supply by the DFS of the Petitioner to the outbound passenger constitutes exports by the DFS. Consequently, in terms of section 16(1) of the IGST Act, it becomes a zero rated supply.

21. In our view, the Respondent-Authority has erroneously held that the Petitioner does not satisfy the crucial test of sending of the goods to foreign destination where they

would be received as 'imports', to deny the benefits of zero rated supply.

22. During the period beween 1st July 2017 and 31st January 2019, the supply of goods from arrival DFSs is also treated as "export" by the central government vide order dated 31st August 2018 in a custom matter of *Aarish Altaf Tinwala (supra)* and this position has been affirmed by the Supreme Court by rejecting the writ petition filed against this central government order vide its order dated 10th May 2019 in *Writ Petition (c) No.564 of 2019***.** Hence by legal fiction, the supply of goods from arrival DFS would also be an export of goods under the IGST Act, and hence, a zero rated supply. Since the zero-rated supply qualifies for 100% ITC, the Petitioner is eligible for the refund thereof.

23. With effect from 1st February 2019, in view of the CGST (Amendment) Act, 2018, supply of warehouse goods before clearance for home consumption have been notified/ classified as activities or transactions which shall not be treated as a supply of goods. Accordingly, effective from 1st February 2019, sale of goods from arrival DFS falls under entry 8(a) of Schedule III to CGST/SGST Act; and further, section

17(2) of the CGST Act is amended according to which reversal of ITC pertaining to activity specified in Schedule-III is not required. Accordingly, the Petitioner is to claim ITC pertaining to arrival FS also. Once this ITC is eligible, refund of entire ITC pertaining to departure and arrival DFS is eligible, based on formula of refund prescribed in Rule 89.

24. It was pointed out on behalf of the Petitioner having DFSs, that the same Petitioner is getting refund of ITC pursuant to sales from their other DFSs in the departure area of other international airports within India. The said contention was not disputed by the Respondents. The GST regime is based on *"One nation, one tax theory"*. The authorities in the State of Maharashtra cannot give a discriminatory treatment, particularly when the refund has been and is being granted in several other States.

25. The impugned show cause notices allege that the goods imported by the petitioner from outside India into the special warehouse would constitute import of goods under the proviso to section 7(2) of the IGST Act, and thereby, liability of payment of tax under the proviso to section 5 of IGST Act is alleged. It further alleges non-payment of SGST on the

transactions of sale of goods effected to the international passengers going out of India.

26. We find sufficient merit in the submissions of the petitioner that import of goods in terms of section 2(10) of the IGST Act means bringing the goods into India from a place outside India. As per Section 7(2) of the IGST Act, goods imported into the territory of India, till such time it crosses the customs frontier of India, shall be treated to be a supply of goods in the course of inter-State trade and commerce. As per Section 2(4) of the IGST Act, the customs frontier of India means the limits of a customs area as defined in section 2 of the Customs Act. The duty free warehouse and DFS of the petitioner are only within the limits of the customs area and therefore, the goods lying therein do not cross the customs frontier and consequently, the importation will continue to be only in the state of inter-State trade and commerce in terms of Section 7(2).

27. We find sufficient merit in the submissions of the petitioner that petitioner only files bill of entry for warehousing. No liability under section 12 read with section 3(12) of the Customs Tariff Act would get triggered at all by

filing bill of entry for warehousing. The customs duty and IGST is leviable only on removal of warehoused goods from the customs area, which happens when the arriving passengers leave the custom area. Since, the goods sold by DFS to arriving passengers do not leave the customs area, DFS is neither liable to pay customs duty, nor IGST.

28. We also find merit in the contention of the Petitioner that both before and after the introduction of GST, the sales to arriving passengers continue to be sales in and/or from the custom area, as at the point of sale in DFS, the goods have neither crossed the customs frontier nor have they been cleared for home consumption by DFS. Accordingly, neither customs duty, nor Integrated Tax, is payable by DFS.

29. Furthermore, we find merit in the contention of the petitioner that arriving passenger's baggage is exempt from the integrated tax in view of the Customs Notification No. 43/2017-Cus dated 30th June 2017 and IGST Notification No. 2/2017 IGST (rate) dated 28th June 2017. In view of the above exemption read with the duty free allowance available under the Baggage Rules applicable to arriving passengers, neither customs duty (upto the permitted baggage allowance) nor

IGST is levied on such goods. Such import of goods by arriving passengers across custom frontier as passenger baggage is therefore an exempt supply under the GST, hence no IGST is payable by either the DFS on its imports, or on supply to arriving passengers. The arriving passengers are also not required to pay any IGST on crossing the custom frontiers, in view of the above exemption read with the duty free allowance under the Baggage Rules.

30. In the backdrop above, in our view, consequently, the charging provision that will get attracted is only the proviso to section 5 of the IGST Act, which again mandates two aspects:

(a) the IGST will be levied only at the points when the duties of customs are levied on such goods under section 12 of the Customs Act read with Section 3 of the Customs Tariff Act, 1975; and

(b) the point of levy under section 12 of the Customs Act would arise only when a bill of entry is filed under section 68 of the Customs Act. This Provision relates to warehoused goods meant for home consumption and therefore, liability to pay duty occurs only when a

bill of entry for home consumption is filed.

31. Significantly, in view of the CGST (Amendment) Act, 2018 effective from 1st February 2019, supply of warehoused goods before clearance for home consumption have been notified/classified under Schedule-III of the CGST Act as activities or transactions, which shall be treated neither as a supply of goods, nor a supply of services. Accordingly, effective from 1st February 2019, sale of goods from arrival DFS falls under entry 8(a) of Schedule-III to CGST/SGST Act. However, Since, supply of goods from departure DFS is "export" and the same is not cleared for home consumption, the same does not fall under Schedule-III of CGST/SGST Act.

32. The Supreme Court of India in the matter of *Kiran Spinning Mills vs. Collector of Customs [AIR 2000 SC 3448]* has held thus :

> *6. .....That apart, 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. .....The import would be completed only when the goods are to cross the customs barriers and that is the time when the import duty has to be paid and that is what has*

> *been termed by this Court in IN RE: The Bill to amend Section 20 of the Sea Customs Act, 1878 and Section 3 of the Central Excise Act, 1944 [(1964) 3 SCR 787 at page 823] Sea Customs Case as being the taxable event. The taxable event, therefore, being the day of crossing of customs barrier, and not on the date when the goods had landed in India or had entered the territorial waters. .....".*

33. In *Garden Silks Mills Ltd. Vs. Union Of India [1999 (113) ELT 0358 (SC)]* the Supreme Court has held thus :

> *"16 ..... 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."*

34. Needless to say that if the duty free shop, which caters to the outgoing or incoming international passengers, is subjected to local taxes by the State, the tax burden will increase and the price of the goods, which are supposed to be free of taxes and duties, will go up, and the same would prevent the duty free shops in India from competing with DFSs at international airports elsewhere in the world. This will also hamper and prejudicially affect our foreign trade, and augmentation and conservation of foreign exchange. In our opinion, this will also negate the intent and purpose of Article

286 of the Constitution of India.

35. We are bound by the judgment of Constitution Bench in *J. V. Gokal & Co. (supra)* which was followed by the Supreme Court in the matter of duty free shops in *Hotel Ashoka (supra),* and also in the matter of *Kiran Spinning Mills (supra).*

36. In the backdrop of above, we are of the view that impugned order and the impugned show cause notice dated 10th January 2019 are manifestly arbitrary and in the teeth of the purpose and intent of Article 286 of the Constitution of India and the provisions of the GST law read with the Customs Act, 1962.

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.

38. In the light above, criminal application no. 8 of 2019 taken out in Criminal PIL No. 14 of 2019, is rendered infructuous and the same is, therefore, dismissed.

[SMT. BHARATI H. DANGRE, J.] **[RANJIT MORE, J.]**

At this stage, Mr. Sonpal, learned special counsel for the Respondent-State seeks stay to this judgment and order. In view of the detailed reasons given in support of the judgment and order, we are not inclined to grant the said prayer of Mr. Sonpal and the same is accordingly refused.

[SMT. BHARATI H. DANGRE, J.] **[RANJIT MORE, J.]**