2022 (64) G.S.T.L. 564 (Tri. - Mumbai)

IN THE CESTAT, WEST ZONAL BENCH, MUMBAI
S/Shri C.J. Mathew, Member (T) and Ajay Sharma, Member (J)

FLEMINGO TRAVEL RETAIL LTD.
Versus
COMMR. OF CGST & C. EX., MUMBAI EAST

Final Order No. A/85089/2022-WZB, dated 10-2-2022 in Appeal No. ST/85046/2021

ST : Duty free shops at arrival/departure terminals of Airport are located beyond Customs frontiers i.e. outside taxable territory of India; therefore, no service tax is chargeable on rent of such duty free shops

ST : Refund claim is conditional upon final resolution of challenge; computation of "relevant date" for limitation purpose shifts to pronouncement of judgment

Refund of Service Tax - Renting of Immovable Property Service - Duty free shops at arrival/departure terminals of Airport - Located beyond Customs frontiers, outside taxable territory of India - Rent being paid for rental space in arrival or departure lounge area in non-taxable territory, no Service Tax chargeable on such rent - 'Taxable territory' not necessarily same as geographical reaches of India and nor limited to physical frontiers - Service Tax collected on such rent in the nature of tax collected without authority of law - Provision relating to unjust enrichment not available to deny refund in such case relating to non-taxable territory for tax-free sales in duty free shops - Respondent, therefore, entitled to seek refund of such tax collected without authority of law for non-taxable services - Section 66B of Finance Act, 1994 - Article 286 of Constitution of India. *[paras 14, 22 to 24]*

Refund - Limitation - Relevant Date - Refund claims made within one year from date of judicial determination by Tribunal of eligibility of appellant to exemption from levy of Service Tax - Issue of vires of levy pending before High Court, therefore, refund claim conditional upon final resolution of challenge and computation of 'relevant date' for refund arising from judicial determination shifts to pronouncement of verdict - Refund claim not time-barred - Section 11B of Central Excise Act, 1944. *[para 11]*

Judicial Discipline - Binding precedent - First appellate authority, even if personally endowed with better knowledge and higher wisdom, bound to follow decision of superior judicial authority. *[para 12]*

Appeals allowed in favour of assessee

CASES CITED

A-1 Cuisines Private Limited v. Union of India — 2019 (22) G.S.T.L. 326 (Bom.) — *Relied on* [Paras 9, 21, 22]
Arif Altaf Tinwala — F. No. 371/142/B/2018-RA/1391, dated 31-8-2018 — *Relied on* [Paras 9, 21, 22]
Commissioner v. DFS India Pvt. Ltd. — 2019 (365) E.L.T. 577 (Tribunal) — *Referred*..... [Para 7]
Commissioner v. Flemingo Duty Free Shop Pvt. Ltd. — 2018 (8) G.S.T.L. 181 (Tribunal) — *Relied on* [Paras 6, 7, 10, 11, 12, 15, 16, 21]
Delhi Duty Free Services Pvt. Ltd. v. Commissioner — 2020-TIOL-775-CESTAT-DEL — *Referred* [Para 8]
Hotel Ashoka v. Asstt. Commissioner — 2012 (276) E.L.T. 433 (S.C.) — *Relied on*..... [Paras 8, 19]
In House Production Ltd. v. Commissioner — 2017 (3) G.S.T.L. 97 (Bom.) — *Relied on*.. [Para 11]
M.G. Shahani & Co. Ltd. v. Collector — 1994 (73) E.L.T. 3 (S.C.) — *Referred*..... [Para 6]
Paul Merchants Ltd. v. Commissioner — 2013 (29) S.T.R. 257 (Tribunal) — *Relied on*..... [Para 18]
Sant Lal Gupta v. Modern Coop. G.H. Society Ltd. — 2010 (262) E.L.T. 6 (S.C.) — *Referred* [Para 12]

DEPARTMENTAL CLARIFICATION CITED

C.B.E. & C. Circular No. 80/10/2004-S.T., dated 17-9-2004..... [Para 15]

NOTIFICATION CITED

Notification No. 41/2012-S.T., dated 29-6-2012..... [Para 15]

REPRESENTED BY : S/Shri V.S. Nankani, Senior Advocate with Prakash Shah, Advocate, for the Appellant.
Shri Nitin Ranjan, Deputy Commissioner (AR), for the Respondent.

[Order per : C.J. Mathew, Member (T)]. - Aggrieved by the dismissal of their appeal challenging the rejection of claim for refund of service tax borne by them in relation to their transaction with Mumbai International Airport Ltd. (MIAL) for the period from 1st October, 2011 to 30th June, 2017 as not subject to levy under Finance Act, 1994, M/s. Flemingo Travel Retail Ltd. (formerly known as DFS India Pvt. Ltd.) seeks setting aside Order-in-Appeal No. CKJ/GST/A-I/82-88/2020-21, dated 25th September, 2020 of Commissioner of GST & CX (Appeals-I), Mumbai and consequential relief amounting to ₹ 57,11,16,849 involved in the seven claims. The appellant is in the business of running 'duty free shop' in the arrival and departure terminals of Mumbai International Airport and the tax included in the billings raised by the airport operator had, for long, been the subject of litigation with tax authorities insisting that the levy under Finance Act, 1994 was payable on 'rent' charged for immovable property within coverage of 'airport service' for the period prior to 1st July, 2012 and of 'service' for the period thereafter.

2. In disposing of the claim for refund, and the subsequent challenge to the disallowance thereof, on the rather featureless topography of 'consideration', as perceived by them, the lower authorities appear to have glossed over the underlying fractal geometry of the levy shaped by the definitions attending upon the charging provision of Finance Act, 1994. This is the thrust of the arguments marshalled on behalf of the appellant in continuation of their consistent critique of the show cause notice for having distorted of the contours of the claim founded on being beyond the ambit of legislative intent. The original authority restricted the findings on merit to countering of the decisions on 'taxable territory' cited in support of the claim with more attention devoted to ineligibility arising from the bar of limitation. The first appellate authority forayed further afield to unleash the bar of 'unjust enrichment' too.

3. The denotation of the undertaking of the appellant, viz., 'duty free shop' is a stranger to the taxing statutes with which it is most concerned but is common description of the refuge offered for the atavistic craving in social man (and woman), burdened with levies from birth to death, to sojourn, even temporarily while on cross-border travel, beyond the reach of the tax collector little realizing that the reprieve is illusory. It can safely be posited that there is no such thing as 'duty free' for the traveler except by the largesse of the State which may, for that class of persons, accord 'free allowance' - exemption to specified goods and upto a threshold value - on arrival in the country; effectively 'duty free' is for the operator of the selling establishment (in 'wholesale') who, by the nature of business, is not liable to duties of customs. International travel, and in those metallic capsules called 'airplanes', is big business with the aircraft docking stations, where passengers are corralled for a time, offering opportunities for spatial design to engage this commercially significant segment of the populace. The constraints - volumetric and mass - in aircrafts is manifested as premium charged for carriage of articles and it is the retail facilitation of disembarking passengers that determines airport footfalls; the bundling of passenger facilitation is, thus, at the core of business in the operation of an airport which may be undertaken on their own or, if commercial feasibility dictates otherwise, by outsourcing to specialists in any of those niche segments. For the nonce, this facet is parked as we turn to other aspects of the dispute.

4. The concession-holder of the airport has been in receipt of financial flow from the appellant on which tax liability under Finance Act, 1994 was also incorporated in the billings. This was not acceptable to the appellant who took recourse to constitutional remedies before the Hon'ble High Court of Bombay to contest the validity of such inclusion. The *minutiae* of the developments there do not concern the challenge brought before us; suffice it to say that the billings were honoured in entirety, though the dispute remains unresolved, and, as undertaken before the Hon'ble High Court, subject to final outcome of the proceedings. This factual matrix has a bearing on one of the grounds on which the claims were found unacceptable by the lower authorities.

5. The business of the appellant was conducted at both the arrival and departure terminals. On the departure side, the outlet was accessible to outbound passengers after completion of all procedural formalities prior to boarding of aircraft. On the arrival side, the facility existed just before the baggage carousel beyond which is the customs channel marking the point of no return for declaring of dutiable or prohibited goods in the possession of passengers.

6. Learned Senior Counsel, Mr. Vikram Nankani, drew our attention to the foundational facts pertaining to the claims filed on 21st September, 2018 for the period from 1st October, 2011 to 31st March, 2014 and on 25th September, 2018 for the period from 1st April, 2014 to 30th June, 2017 following the decision of the Tribunal in *Commissioner of Service Tax* v. *Flemingo Duty Free Shop Pvt. Ltd.* [2018 (8) G.S.T.L. 181 (Tri. - Mum.)] on 28th September, 2017 arising from a dispute with service tax authorities that upheld their entitlement to refund of tax paid on 'services' procured for undertaking 'duty free' supply. According to him, the pendency of their dispute, even as they obliged, as a tentative measure, in remitting the tax amount with the approval of the Hon'ble High Court, did shift the 'relevant date' for the purpose of determining eligibility under Section 11B of Central Excise Act, 1994, applied under the authority of Section 83 of Finance Act, 1994, for disposal of claims for refund of service tax. The tortuous course of the litigation on the coverage of two specified services, enumerated in Section 65(105) of Finance Act, 1994, invoked for charging the appellant with tax on payments made to the airport concession-holder was elaborated upon by him to discountenance the bar of limitation which the lower authorities took refuge in to repel the claims. Reliance was placed on the decision of the Hon'ble Supreme Court in *M.G. Shahani & Co. Ltd.* v. *Collector of Central Excise, New Delhi* [1994 (73) E.L.T. 3 (S.C.)] holding that

> '7. Having regard to the course which we propose to adopt there is no need to discuss the merits of the case. To our mind, it appears that the Tribunal has adopted an easy course in remitting the matter to the Collector. On the materials on record, being an appellate authority, the Tribunal itself should have analysed the evidence and given a factual conclusion. If this course had been adopted the decision could have been rendered in one way or the other. The remit was superfluous and the parties had argued at length. Therefore, we set aside the impugned order of the Tribunal and remit the matter to it. The Tribunal is directed to decide the issues involved on their merits. The appeal will stand disposed of in the above terms. However, there shall be no order as to costs.'

to suggest that the Tribunal, when presented with facts for resolving the issue of limitation, is obligated to do so even if lower authorities had not cared to ascertain their relevance.

7. Casting doubts on the application of mind in the impugned order, Mr. Nankani drew our attention to the upholding of the rejection by the original authority of the entirety of the claim as pertaining to the outlet in the arrival terminal to sidestep, by incorrect premise, the earlier decision of the Tribunal which had dealt with entitlement to refund of tax on 'service' deployed at

the departure outlet; according to him, ₹ 13,79,72,476 pertained to tax on payments relatable to the departure outlet even as the remaining ₹ 8,42,13,688, out of the ₹ 22,21,86,164 claimed in three applications of 21st September, 2018 for October, 2011 to March, 2012, April, 2012 to March, 2013 and April, 2013 to March, 2014, were payments related to the arrival outlet. He further contended that the Tribunal had, in *re Flemingo Duty Free Shops Pvt. Ltd.*, settled the issue thus

> '18. In the instant case, there is no dispute that the duty-free shops, whether in arrival or departure lounge, of the International Airports are beyond the customs frontiers. Thus, they are outside the taxable territory and thus in non-taxable territory. The Grounds taken in the Appeal also show that the department deems these duty free shops in foreign territory. Since, the rent is paid for the rental space in arrival or departure lounge area in non-taxable territory, the same therefore is not a taxable service.
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> 19. Therefore, no Service Tax is chargeable at the first instance on rent for rental of Customs Bonded Warehouse (Duty Free Shop), whether it be in the arrival lounge or in the departure lounge. The levy of Service Tax paid by the respondent is therefore not authorised by law in view of provisions of Finance Act, 1994 read with Article 286 of the Constitution of India.'

The other four claims filed on 25th September, 2018 pertained exclusively to payments of ₹ 34,89,30,685 relatable solely to the arrival outlet for 2014-15, 2015-16, 2016-17 and for the first quarter of 2017-18 upon extinguishment of levy under Finance Act, 1994. The refund of tax charged for this period on the payments relating to the outlet on the departure side was upheld by the Tribunal in *Commissioner of Service Tax-V* v. *DFS India Pvt. Ltd.* [2019 (365) E.L.T. 577 (Tri. - Mumbai)].

8. It was further contended on behalf of the appellant that the principle thus laid down, and reiterated in the disposal of application for rectification of mistake therein besides being followed in *re DFS India Pvt. Ltd.* and in *Delhi Duty Free Services Pvt. Ltd.* v. *Commissioner of CGST* [2020-TIOL-775-CESTAT-DEL], had been inappropriately trivialized as non-binding observation unrelated to the grounds enunciated, and relief sought by the appellant-Commissioner, before the Tribunal. This, according to them, is not only disregard of judicial discipline but also patently contrary to the decision of the Hon'ble Supreme Court in *Hotel Ashoka* v. *Assistant Commissioner of Commercial Taxes* [2012 (276) E.L.T. 433 (S.C.)], pertaining to transactions occurring beyond customs barriers, which laid the foundation for the ruling of the Tribunal.

9. It was also pointed out that the contrived discarding of the decision of the Government of India, in revisionary jurisdiction, in *re Arish Altaf Tinwala* [F. No. 371/142/B/2018-RA/1391, dated 31st August, 2018] as well as the affirmation of the very same principle in *A-1 Cuisines Pvt. Ltd.* v. *Union of India* [2019 (22) G.S.T.L. 326 (Bom.)], which attained finality with dismissal of appeal of Revenue before the Hon'ble Supreme Court, by the lower authorities demonstrates unwillingness to accept the legal foundations of tax levy. On the finding that unjust enrichment was an impediment to the grant of refund, it was brought to our notice that pricing of products in 'duty free shops' is not linked to the costs but to prices charged by competitors at the several airports around the world and that, furthermore, they had furnished the prescribed certificate from chartered accountant in support of having borne the incidence of tax which was ignored by the lower authorities.

10. Learned Authorized Representative contends that the reliance placed on decisions does not come to the assistance of the appellant as DFS India Pvt. Ltd. is an entity separate from that of the disputant whose entitlement for refund had been upheld by the Tribunal. According to him, consequential, and particularly 'restitution', refund must flow directly from judicial resolution of a dispute of the claimant themselves and benefit accorded to Flemingo Duty Free Shops Pvt. Ltd. does not accrue to another entity. The inapplicability of the decision in *re Flemingo Duty Free Shop Pvt. Ltd.*, with reference to 'export' being the relevant factor that weighed with the Tribunal in a claim for refund of tax paid on procurement of 'service' deployed for exporting goods, evident from

> '24. There is no dispute on the fact that it is not possible to carry on the export sales at the Duty Free Shop at the departure terminals, without having a space there, which can only be possible by taking the duty free shops on rent from Airport Authority of India. In view of the above, the renting of airport premises at the departure module has a direct nexus with the export sale being made by the respondent.'

to the present dispute on the impugned activity being beyond the pale of levy under Finance Act, 1994 was emphasized by him. Highlighting the distinguishment of 'arrival' and 'departure' areas of an international airport in the impugned order, he argued that exclusion from 'taxable territory' in transactions involving goods sold to 'outbound' passengers cannot be extended to sales effected to 'inbound' travelers. As far as the bar of 'unjust enrichment' is concerned, he submitted that the issue, though raised for the first time in appellate proceedings, should have been scrutinized by the refund sanctioning authority and it is the lack thereof that prompted the first appellate authority to fill the gap.

11. Having thus set out the conceptual backdrop and noted the essence of the rival submissions, we proceed to consider the primary issues - applicability of bar of limitation and legal authority for the levy - brought before us by the appellant. The appellant, admittedly, was not fastened with the statutory responsibility to deposit service tax in the Consolidated Fund of India but was liable to discharge the tax component of the payments, contractually claimed by the airport concession-holder, in periodical bills. However, under Section 11B of Central Excise Act, 1944 as applied to Finance Act, 1994, appellant, having thus been saddled with the burden, is entitled to seek extraction of tax collected from the Consolidated Fund of India on establishing the absence of legislative intent. As the statutory enactment stipulates time-period beyond 'relevant date' for preferring such claims, that constraint on the assessee liable to tax, which, by default, is date of payment of tax, is similarly applicable to bearer of tax burden. The appellant filed the claims within one year from the date on which the Tribunal interpreted the law on levy of service tax as not intended to cover the business of the appellant. The sole contention of Revenue is that the impugned claims are not a direct consequence of judicial determination of eligibility of particular applications for refund. The communication from the airport concession-holder to service tax authorities that clearly declare payment of tax under protest has been placed before us; such conditional payments are specifically excluded from being subject to the bar of limitation in Section 11B of Central Excise Act, 1944. *Ultra vires* of the levy was in dispute before the Hon'ble High Court of Bombay under Article 226 of the Constitution and tax compliance, with the approval of the Hon'ble High Court, rendered it tentative and conditional upon final resolution of the challenge. Section 11B of Central Excise Act, 1944 shifts the 'relevant date' for refund arising from judicial determination to pronouncement of the verdict for computation of the deadline within which claim may be preferred; there is no legal bar on filing of claim even before such judicial disposal of the dispute and the competent authority could, at best, have kept the claim pending to await the outcome of the dispute. There is no finding that the said dispute, which could, conceivably,

have led to refund, had been resolved at all. There was, thus, no legal ground to reject the claim as barred by limitation of time. In the meanwhile, the leviability of the impugned activity to tax was sought to be disputed through the refund route; the appellant, not being the assessee, was excluded from appellate remedy under Finance Act, 1994 against the charging of tax and claim for refund was the only alternative under the statute. By all accounts, the refund claim, filed when a judicial enlightenment, in *re Flemingo Duty Free Shop Pvt. Ltd.*, was available lies within limitation as held by the Hon'ble High Court of Bombay in *In House Production Ltd.* v. *Commissioner of Service Tax, Mumbai* [2017 (3) G.S.T.L. 97 (Bom.)]. Therefore, there is no hurdle in proceeding to decide upon the contention that Finance Act, 1994 did not envisage levy of tax on the transactional flow between the appellant and the airport concession-holder.

12. Several reasons have been adduced in the impugned order to disparage the submission of the appellant therein that the decision of the Tribunal in *re Flemingo Duty Free Shops Pvt. Ltd.* takes the activity out of the sphere of taxability and not the least of which is that a deeming provision in Customs Act, 1962 cannot be applied to another statute for which support was sought to be drawn from the decision of the Hon'ble Supreme Court in *Sant Lal Gupta* v. *Modern Cooperative Group Housing Society Limited* [2010 (262) E.L.T. 6 (S.C.)] decrying such interpretation as encroachment upon legislative domain. We desist from digressing on such foray on the part of the first appellate authority who, even if personally endowed with better knowledge and higher wisdom, may embark upon speculating on the intent in the decision of superior judicial authority only at peril of being insubordinate. In postulating distinguishment from such decision, the first appellate authority appears to have got entangled in its own weave; the refund claim in *re Flemingo Duty Free Shops Pvt. Ltd.* was under the mechanism for relieving tax burden on a seller who, for one reason or other, was not liable to terminal duties on the transaction and in the sale to 'inbound passengers' too terminal duties are not the liability of the seller. It also does not seem to have been appreciated by the first appellate authority that a deeming provision, as a temporary suspension of conventional wisdom and existing legislative formulation of a concept or a situation for a specific purpose, is interpolated for carving out applicability of the statute even if contrary to the general formulation of the statute and that 'definitions' do not deem but are. An express limitation on jurisdiction in a taxing statute is not a deeming provision but maps the boundaries within which a tax collector may enforce obligations under the statute. Again, here we do not propose to tarry on the superimposition of 'customs area' in Customs Act, 1962 over 'taxable territory' in Finance Act, 1994 in the face of the primary submission of the appellant disputing the extent to which every transactional flow between two contracting parties can be subject to levy as 'taxable service' within the meaning of Section 66 of Finance Act, 1994 and 'service' within the meaning of Section 66B of Finance Act, 1994 for which we attend to the nature of the activity itself.

13. Aerodromes and harbours are, in essence, docking facilities for 'conveyances' that traverse beyond land and geographical boundaries for discharge and loading of persons and goods. Doubtlessly under the sovereign authority, including over taxation, of the State within which it lies, parliamentary will of the State may not exclude any part of its geographical limits from the application of an enacted special law. However, to the extent that is, it is not open to the executive to persuade otherwise. A clear perusal of the taxing statute, uninfluenced by uniformed understanding, is essential to enforcing rule of law. We have, elsewhere, elaborated upon the emotional appeal of 'duty free shopping' that is stated by establishing such facilities in airport terminals and the scheme of Customs Act, 1962 permits operations that exclusion of duties even within the geographical boundaries of the State. It is, thus, that the law on service tax is also examined for evaluation of the claim of the appellant.

14. A legislatively bound 'taxable event' in a tax statute does not lend itself to be stretched to the bounds of sovereign jurisdiction if legislative wisdom wills otherwise; to do so would be executive overreach which is anathema to rule of law. The first appellate authority has fallen into error by confounding the scope of legislative authority with statutory intent which is restricted not just to 'taxable territory' but also to 'taxable service' in both the eras that this dispute straddles. 'Taxable territory' is not necessarily the same as the geographical reaches of India and nor can it by limited to the physical frontiers; it is what Finance Act, 1994 states it to be - nothing more and nothing less. So too with 'taxable service' circumscribing the jurisdiction of tax authorities. That presumption by the lower authorities appears to have blindsided them from perceiving the core of the dispute over tax discharged between 2011 and 2017 in the seven claims preferred by M/s. Flemingo Travel Retail Pvt. Ltd. in September, 2018 for each fiscal year or part thereof.

15. M/s. Flemingo Travel Retail Pvt. Ltd. appeared in the frame of this dispute by its merger with the contracted operator of 'duty free shops' in Mumbai International Airport, M/s. DFS India Pvt. Ltd., on 16th November, 2017. After Mumbai International Airport Ltd. (MIAL) was awarded the concession to operate the airport in 2007, the running of 'duty free' facility on the arrival and departure side was contracted to M/s. DFS India Pvt. Ltd. under licence agreement of 26th November, 2007. Initially, the airport concession-holder charged them to service tax on the licence fee incorporated in the said agreement as consideration under the authority of Section 65(105)(zzzz) of Finance Act, 1994 which, with effect from 1st June, 2007, was intended to tax 'renting of immovable property service' as defined in Section 65(90a) of Finance Act, 1994; the constitutional validity of the levy had been challenged by several petitioners including the appellant herein. At the same time, a levy for providing of 'airport service' did exist with the incorporation of (zzm) in Section 65(105) of Finance Act, 1994 from 10th September, 2004 providing also for non-applicability of Section 65A of Finance Act, 1994 which, since 14th May, 2003, afforded a mechanism for isolating the 'taxable service' in the event of overlap; impliedly, 'taxable service' rendered within the airport did not warrant segregation of activity for charging of tax. However, consequent to amendments effected in 2010 to these 'taxable services', the airport concession-holder, by communication dated 26th July, 2010, intimated the appellant that tax would, with effect from 1st July, 2010, be chargeable under the authority of Section 65(105)(zzm) of Finance Act, 1994. Circular No. 80/10/2004/S.T., dated 17th September, 2004 of Central Board of Excise & Customs had categorically excluded tax on rentals from the ambit of Section 65(105)(zzm) of Finance Act, 1994 but that circular was withdrawn on 23rd August, 2007 after Section 65(105)(zzzz) was incorporated in Finance Act, 1994 to tax 'renting of immovable property service' with effect from 1st June, 2007; it would appear that this addition to 'taxable service' rendered 'rental income' in airports also to be levied to tax as provision of 'airport services' thenceforth. Two interim orders of the Hon'ble High Court of Bombay, of 11th September, 2008 and of 6th July, 2010, precluded coercive recovery of tax chargeable on rental income. The re-designating of the service by the airport concession-holder was the subject of the last of the writ petitions in which the appellant herein volunteered to pay the tax

component - arrears as well as future billings - on the 'licence fee' while keeping the dispute alive. Having paid the tax thus, under protest and during the pendency of writ proceedings, the ruling of the Tribunal in *re Flemingo Duty Free Shop Pvt. Ltd.* in appeal of Revenue against sanction of refund of tax paid on services deployed for effecting exports in 2014-15 under the authority of Notification No. 41/2012-S.T., dated 29th June, 2012 to neutralize taxes that, for one reason or other, could not be set off under Cenvat Credit Rules, 2004 in the pricing of export goods, holding that transactions of 'duty free' shops were outside the 'taxable territory' was perceived as settling the law on leviability of their activities to tax. The conclusions that emerge from this narration of facts and circumstances is that, notwithstanding the understanding of the airport concession-holder, tax was chargeable for providing 'airport services' till 30th June, 2012, that it was the judicial determination by the Tribunal in relation to 'duty free' outlets in airports operated by Airport Authority of India that prompted the commencement of the present dispute before us and that the decision of the Hon'ble High Court of Bombay in *re In House Productions Ltd.* was invoked for excluding the time which had elapsed after payment of tax from computation of period of limitation.

16. We have rendered our finding on the inapplicability of bar of limitation on the facts of their own dispute over the taxability of the licence fee payable to the airport concession-holder without any reference to the decision in *re Flemingo Duty Free Shops Pvt. Ltd.* for determination of 'relevant date' as defined in Section 11B of Central Excise Act, 1944. We also do not consider it necessary to rely on that decision as binding precedent for resolution of the present dispute on the scope and reach of Section 66 and Section 66B of Finance Act, 1994 with reference to 'taxable service' elaborated in Section 65(105)(zzm) and 'service' in Section 65B of Finance Act, 1944 for the periods before and after 1st July, 2012.

17. 'Airport service' was taxable from 2004 onwards though specific services, enumerated under Section 65(105) of Finance Act, 1994, rendered within an airport were taxable even earlier. With this omnibus inclusion in the enumeration of taxable services, a range of activities undertaken in an airport were brought to the tax net without recourse to the nuanced identity afforded by Section 65A of Finance Act, 1994; consequently, the blurring, inhering in the frontiers of intangibles such as enumerated services prior to July, 2012 or 'taxable service' thereafter, did not offer a path of avoidance of this levy. It was, simultaneously, an acknowledgement of the bundling of activities that are not amenable to segregation for elective exclusion except at cost of commercial viability of airport operation. The transition to the later tax regime, bereft of nomenclature identity, subsumed the amorphous delineation already in place as far as airports were concerned. The settling of operation of such infrastructure, once the preserve of agencies of the State upon concession-holders under the policy of the Central Government made no difference to the commercial profile of the business itself except that the imperative of economic returns mandated participative and synergistic association of entities with core competency lacking in the concession-holder. That is the nub of the dispute here : users of international airports have expectations, including 'duty free' outlets on par with global best, which may be ignored only to their commercial detriment and whether the provisioning for such expectations, through third parties, for return on investment is 'taxable event' under Finance Act, 1994 both before and after 1st July, 2012.

18. It would appear that the lower authorities commenced their findings with the description of the 'taxable service' in Section 65(105)(zzzz) of Finance Act, 1994 for the brief period of dispute prior to 1st July, 2012 and on the continued taxability thereafter in a tax regime that dismantled the boundaries of separately enumerated services with the luxury of not having to determine fitment as a prelude to assessment. To a large extent, the superficial understanding that the appellant had been provided space by airport concession-holder with attendant consideration being rent and the disinterest evident in the discharge of obligation to deposit tax devolving on the payee appears to have persuaded the lower authorities that a challenge to the foundation of the levy, irrespective of nomenclature, requiring scrutiny of :

> '(105) "taxable service" means any service provided or to be provided'

in Section 65 of Finance Act, 1994 in concatenation with the applicable enumeration thereafter for applicability to the 'consideration' envisaged by Section 67 of Finance Act, 1994 for assessment under the authority of :

> '**66. Charge of service tax**
>
> There shall be levied a tax (hereinafter referred to as the service tax) at the rate of …. of the value of taxable services referred to in …. of clause (105)….'

was superfluous. The significance of assessment on the entirety of the 'taxable event' which is not mere determination of 'consideration' was highlighted by the Tribunal in *Paul Merchants Ltd.* v. *Commissioner of Central Excise, Chandigarh* [2013 (29) S.T.R. 257 (Tri. - Del.)]. In the absence of such determination, there is no legal foundation for holding, as the lower authorities have, that the levy lies. Likewise, for the period after 1st July, 2012, with tax leviable on 'consideration' determined as per Section 67 of Finance Act, 1994 under the authority of :

> '**66B. Charge of service tax on and after Finance Act, 2012. -** There shall be levied a tax (hereinafter referred to as the service tax) at the rate of ….. on the value of all services, other than those specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another.....'

requiring a provider and recipient for completion of the cycle of :

> '(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include -
>
> an activity which constitutes merely, -
>
> a transfer of title in goods or immoveable property, by way of sale, gift or in any other manner; or ... … …'

and lack thereof depriving the levy of sanctity of law. Implicit in this enunciation for determination of levy are three escapes from the burden - exemption by notification, exclusion through negative list and exception in definition of 'service' - of which the last tends to be unobtrusive elephant in the room. The significance of the definitions are no less than that of classification necessary for commodity taxation as the only manifestation of service transactions is 'consideration' and, all too often, for revenue enthusiasm, that suffices as for confirming the charge. Failure to consider this criticality by the lower authorities deprives their decision of legal support.

19. It is not controverted that appellant sells goods and is, thereby, beyond the pale of tax on service on such sales. Without the 'duty free' specialist, the airport concession-holder would have to undertake this necessary, and cardinal, facilitation

of international airports with such activity too being beyond the pale of tax on service. The goods stocked in these 'duty free' outlets are not liable to duties at the transaction stage and it has been consistently held that exemption from duty liability in the hands of the 'duty free' outlet flows from 'taxable event' occurring later on the arrival side and having occurred before access is afforded to the departure side. This is the thrust of the decisions in *re Hotel Ashoka* which is the foundation of many subsequent judgments cited on behalf of the appellant. Undoubtedly, stocking and display is impossible without space and the sole issue that remains in the dispute is the finding of the lower authorities that space has been provided to the appellant and that the payment flow is 'rent' which is taxable within the meaning 'airport service' or 'service', as the case may be, for the period in dispute.

20. Provision of 'duty free' business is an obligation that devolves upon the airport concession-holder as an essential component in the running of the airport as a business venture. In terms of the contract between the airport concession-holder and the appellant, it is the operation on behalf of the former that is the subject of the agreement. Providing of space already earmarked by the airport concession-holder at the pre-determined location, that is disconnected from commercial considerations and in which the sole liberty accorded to the appellant is choice of goods as well as the display scheme, deprives the contractual relationship of principal-to-principal status. Allocation of space for operation of this undertaking, that otherwise falls to the airport concession-holder, is not the outcome of an option that is attendant upon lessor-lessee relations in which renting of space is the core of the transaction; here it is the 'duty free' outlet that was offered to the appellant with space so pre-designated for the purpose. The appellant is in the business for profit from merchandising and the 'licence fee' referred to can be perceived as remuneration for being allowed to participate in running of the airport with attendant gain to the appellant from sales; that it is a fixed sum does not derogate from the nature of the remuneration. The prism of dogma and lens of commodity taxation appear to have obscured that simple perception. It can be concluded, therefore, that presumption of remuneration as taxable, in the absence of identification of provider and recipient for the period prior to 1st July, 2012 and equating 'taxable territory' with geographical frontiers without identifying the person for whom the activity has been performed, is not consistent with Finance Act, 1994. Perusal of the contract and the nature of the activity inevitably lead to the conclusion of collaborative sharing of sale proceeds which sidelines 'taxable territory' to irrelevance in this dispute.

21. This brings us to the relevance of the decision of the Government of India in *re Aarish Altaf Tinwala* which was referred to before the Tribunal during the hearing on the application for rectification of mistakes claimed to be apparent in the order in *re Flemingo Duty Free Shops Pvt. Ltd.* We had then considered that to be of persuasive value but it is now bought to our attention that the Hon'ble High Court of Bombay in *A1 Cuisines Pvt. Ltd.* v. *Union of India and Others* [(2019) 22 G.S.T.L. 326 (Bom.)] had taken note of the principle espoused therein with approval thus

> '8. We have carefully considered the submissions of the petitioner in the instant petition and have perused the provisions of Article 286 of the Constitution of India, GST laws, Customs Act, 1962 and Finance Act, 1994. We have considered the Judgment of the Hon'ble Supreme Court in the case of *Hotel Ashoka* (supra). We have also perused the two Orders of the CESTAT and of the Central Government following the case of *Hotel Ashoka*, which are relied upon by the petitioner.
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> 9. The Government of India in case of *Aarish Altaf Tinwala* by its order dated 31-8-2018 dismissed the revision of applicant filed by International passenger on relying the case of *M/s. Hotel Ashoka* (cited supra) observing that :
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> "8. The applicant has vehemently pleaded that once he has completed the immigration formalities, he is said to have entered Indian Territory. Thereafter, the goods purchased from the duty free shop situated in the Arrival Hall are not imported. Hence, any such purchases made from the duty free shop are not liable for imposition of customs duties. Therefore, the impugned goods have been wrongly confiscated by the Customs and should be released.
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> 9. The Central Government is of the considered opinion that the contentions of the application are based on the erroneous belief and wrong interpretation of the law and settled legal positions.
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> 10. Section 2(11), Section 2(25) and Section 2(27) of the Customs Act 1962 states as under :-
>
> "**Section 2 : Definitions. -** In this Act unless the context otherwise requires :-
>
> (11) "customs area" means the area of a customs station and includes any area in which imported goods or export goods are ordinarily kept before clearance by the Customs Authorities;
>
> (25) "imported goods" means any goods brought into India from a place outside India but does not include goods which have been cleared for home consumption;
>
> (27) India - includes the territorial waters of India."
>
> 11. The Central Government however observes that the duty free shops though being physically located in Indian Territory, are specifically treated as being located outside the Customs Territory of India, duty free shops are located in the Customs Area defined under Section 2(11) and it includes any area where the imported goods or export goods are kept before clearance by Customs authorities. Goods sold by duty free shops are not duty paid goods and such goods are deposited in a customs bonded premises/warehouses, licensed under Section 58A of the Customs Act, 1962 without payment of duty. Section 71 clearly mandates that no goods shall be taken out of a warehouse except clearance for home consumption, exportation or removal to another warehouse or as otherwise provided by this Act. It is thus clear that such goods need to suffer Customs duty on being exported by duty free shops and imported by passenger in terms of Section 77 of the Customs Act, 1962. The contention of the Applicant that he had entered Indian Territory after immigration formalities and having bought goods within the confines of Indian Territory and is, therefore, not liable to pay customs duty is not legally sustainable.
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> 12. The Hon'ble Supreme Court of India in the case of *M/s. Hotel Ashoka* v. *the Assistant Commissioner of Commercial Taxes and Anr.* (Civil Appeal No. 2560 of 2010) reported in (2012) 3 SCC 204 has held that -
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> "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."

xx xx xx

"30. They 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 the 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 been taken and, therefore, in our opinion, the transactions had taken place beyond or outside the custom frontiers of India."

10. Therefore, the Central Government, in view of the above holds that the transactions effected at the duty free shops at the arrival or departure of the International Airports in India might have taken place within the geographic territory of India, but for the purposes of levy of Customs Duties or any other taxes, the area of duty free shops shall be deemed to be the area beyond the customs frontiers of India. Although, the applicant bought goods from duty free shop at CSI Airport Mumbai, the same are deemed to be imported from across the Customs Frontiers of India and customs duty is payable on such goods. Since the applicant crossed the green channel without declarations and without payment of customs duty, the department has rightly proceeded against the applicant.

11. The Central Government has thus applied the ratio laid down by Hon'ble Supreme Court in *Hotel Ashoka* (supra) and correctly held that the transactions effected at the duty free shops at the arrival or departure of the International Airports in India located after the passenger clears immigration might have taken place within the geographic territory of India, but for the purposes of levy of Customs Duties or any other taxes, the area of duty free shops shall be deemed to be the area beyond the customs frontiers of India and the transaction would be said to have taken place outside India.

12. The aforesaid Judgments are clearly applicable only in respect of supplies to or from duty free shops situated after the passenger crosses the immigration counter beyond the Customs Frontiers, at arrival or departure hall of International Airport Terminals, where the transaction would be said to have taken place outside India. The International travel of incoming or outgoing passenger after immigration clearance would be beyond any doubt. In such event, whether it is the sale/purchase/supplies of goods or services, to or from such duty free shop, the same is said to be taken place outside India. Hence, the same would be a "non-taxable supply" under Section 2(78) of CGST/SGST and such duty free shops located at the International Airports would be in "non-taxable territory" as defined in Section 2(79) of CGST/SGST. As per section 2(24) of IGST, the same meaning as given in CGST/SGST applies for IGST as well.'

The binding nature of the order of the Government of India, in revision jurisdiction, is no longer a matter of conjecture : it is. The dispute before us is, unarguably, not about 'supply' but about 'taxable service' and 'service'; the transition from 'service tax' to 'goods and service tax' is in a smooth continuum unlike the disruption that occurred with the transition from 'duty on manufacture' to tax on 'supply' of goods. The genetic pattern remains unaltered in so far as 'service' is concerned and the depiction of 'duty free' shops in 'non-taxable supply' construct is no less applicable to 'taxable territory' of pre-Goods and Service Tax regime.

22. The underlying principle in *re Aarish Altaf Tinwala* is that the enforcement of a statute is restricted by the operational territory permitted by the statute and not the geographical extent of the State which the legislature has restricted for the purposes of any special law. In the appeal before the Government of India, the passenger sought to persuade that the location of the customs channel was not relevant to the transaction in a 'duty free' outlet within the geographical limits of the country. The Government of India did not find that plea to be sound in law owing to the circumscribing of territory for determination of dutiability and prohibition under the statute. For the functionaries of the very same Government of India to push the frontiers of 'taxable territory' *sans* examination of the limit articulated in the charging provision of the tax statute, contrary to the stand in *re Aarish Altaf Tinwala*, as an argument to charge tax is not appropriate. That which is 'sauce' (as in goose and gander) for enforcement of prohibitions by the tax authorities is also 'sauce' for the target of the tax authorities. It is, thus, amply clear that it is the constraints in the charging provision of Finance Act, 1994, in conjunction with the decisions of Government of India in *re Aarish Altaf Tinwala* and of Hon'ble High Court of Bombay in *A1 Cuisines Pvt. Ltd.*, as affirmed by the Hon'ble Supreme Court, that renders the confirmation of levy in the impugned order as bereft of lawful authority. The denial of claims of refunds are not sustainable in law.

23. 'Duty free' shops in airports are a global market competing among themselves in a 'tax exempt' environment and the compulsions of this business segment, wherein the consumers are not only knowledgeable but also sensitive about pricing, set it apart from a normal trading model which permits the underlying presumption of 'cost plus' implicit in the legislatively nuanced 'unjust enrichment' relied upon by lower authorities. It is also on record that the certificate of chartered accountant, an option that has been sanctified by judicial endorsement, was furnished with the claims for refund and is reasonable explanation for such impediment not having been alleged in the show cause notice. There is no finding on insufficiency or non-acceptability of this evidence of having borne the incidence of tax. Indeed, as pointed out on behalf of the appellant, the appellate authority, suffused with enthusiastic intent to close all avenues for release of the claimed amount, traversed beyond the framework of the show cause notice and the finding of the original authority that gave rise to the grievance leading to the appeal. Clearly, the original authority did not take recourse to the bar of 'unjust enrichment' but passing references to the doctrine, in the context of principle of restitution denying unjust enrichment of the State cited by the claimant, led to pleadings in a context, which appeared to have been misconstrued by the first appellate authority for insinuation of an element that was not in existence in the show cause notice. It does not seem to have mattered a whit to him that there is a distinction with a difference, to borrow an expression from the argument of Mr. Nankani, between recourse to bar of limitation and ineligibility for denial of claim of refund, which authorizes the retention of tax collected in the Consolidated Fund of India, and denial of benefit to claimant by recourse to

bar of ‘unjust enrichment’ which mandates transfer to the Fund established for a specific purpose by parliamentary sanction. The finding of applicability of ‘unjust enrichment’ is, thus, not only beyond the sanction of law but is also entirely superfluous as the notice issuing authority, cognizant of deficiencies - factual and cognitional - in the claim, had already mapped the boundaries within which claim would be adjudicated. Submissions on the interpretation of principle of restitution by the original authority that did not render a finding on bar of ‘unjust enrichment’ is too remote a crutch to substitute for the statutory mandate of Section 128A(3) of Customs Act, 1962 which the first appellate, admittedly, did not resort to.

24. In view of our findings above that the claims for refund were filed within the period permitted under Section 11B of Central Excise Act, 1944, relate to levy which the law did not authorize for collection and which had been borne by the appellants, appeals are allowed with consequential relief.

(Order pronounced in the open Court on 10-2-2022)

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