

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 7777 of 2018**

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FLEMINGO DUTYFREE SHOP PRIVATE LIMITED & ANR.
Versus
UNION OF INDIA & ORS.

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Appearance:

MR SAURABH SOPARKAR, LD.SR.ADV WITH MR.ANAND NANAVATI AND
MR.KAUSTUBH SRIVASTAVA FOR NANAVATI ASSOCIATES(1375) for the
Petitioner(s) No. 1,2

MR SHALIN MEHTA, LD.SR.ADV WITH ADITI S RAOL(8128) for the
Respondent(s) No. 3,4

MR RAJ TANNA, AGP for the Respondent(s) No. 2

MR CHIRAYU A MEHTA(3256) for the Respondent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE BHARGAV D. KARIA
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 29/07/2024

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned Senior Advocate Mr.Saurabh Soparkar with learned advocate Mr.Kunal Nanavati and learned advocate Mr.Kaustubh Srivastava for Nanavati Associates for the petitioners, learned advocate Mr.Chirayu Mehta for the respondent No.1, learned Assistant Government Pleader Mr.Raj Tanna for the respondent No.2, learned Senior Advocate Mr.Shalin Mehta with learned advocate Ms.Aditi



Raol for the respondent Nos.3 and 4.

2. Learned Senior Advocate Mr.Saurabh Soparkar for the petitioners has tendered the draft amendment. The same is allowed in terms of the draft. To be carried out forthwith.

3. As per the aforesaid draft amendment, the prayer made in this petition is modified and the petition is restricted to the same in view of the subsequent developments which have taken place after filing of this petition as under:

"c-1) In the alternative and without prejudice to prayers (a) and (b) above, this Hon'ble Court be pleased to order and direct Respondents No.1 and 2 not to insist on deposit of CGST and SGST by Respondent No.4 for the period starting from 01.07.2018 and ending on 06.11.2020 and permit the Petitioners

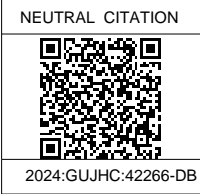


to reimburse CGST and SGST for the months of April 2018 and May 2018 and direct Respondents No.1 and 2 to claim refund of CGST and SGST deposited by Respondent No.4 for the months of April 2018 and May 2018 upon filing of the requisite application for refund under Section 54 of CGST Act read with Rule 89 of the CGST Rules filed by the Petitioners."

4. The brief facts of the case are as under :

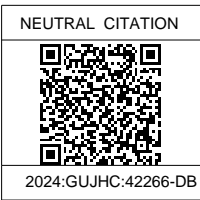
4.1. The petitioners are having a Duty Free Shop at the Arrival and Departure Terminal of the Sardar Vallabhbhai Patel International Airport, Ahmedabad for a term of seven years starting from 26th February, 2016.

4.2. The respondent No.4-Office of Airport Director for Sardar Vallabhbhai Patel International Airport, Ahmedabad started



raising invoices upon the petitioners in view of the implementation of the Central Goods and Services Tax Act, 2017 and the Gujarat Goods and Services Tax Act, 2017 styled as "License fees for exclusive Concession to Develop, Operate and Maintain Duty Free Shops" for both the Arrival and Departure Duty Free Shops at the rate of 18% upon such Concession Fee (for short 'the Consession Fee') paid by the petitioners to the respondent No.4.

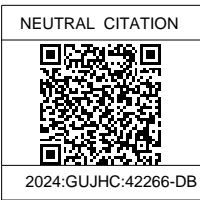
4.3. It is the case of the petitioners that on 31.10.2017, a representation was made to the respondent No.4 indicating that CGST, SGST and IGST would not be applicable towards Minimum Guarantee/Revenue Share being paid for operation of Duty Free Shops at both the Arrival and Departure Terminal of the international airport since the same are



located beyond the custom barrier.

4.4. It is also emerging from the record that the petitioners made payment of invoices up to January, 2018 under protest in view of the interim-order dated 04.01.2018 passed by the Punjab & Haryana High Court restraining the respondent No.3-Airport Authority of India from levying of any tax under the GST Act. Similarly, the Madras High Court, Madurai Bench also on 16.02.2018 passed an interim-order granting injunction against the respondent No.3 from collecting GST on the supply of the services to the petitioner No.1.

4.5. By order dated 23rd February, 2018 also, the Madras High Court passed an injunction restraining the Airport Authority of India from collecting GST on supply of



service to the petitioner No.1.

4.6. By order dated 01.03.2018, the Kerala High Court also passed an interim-order injuncting respondent No.3-Airport Authority of India from collecting GST from the petitioners.

4.7. The Hon'ble Apex Court dismissed the petition on 23.04.2018 filed by the Airport Authority challenging the order passed by the High Court of the Punjab and Haryana on the ground that the same has been filed against the interim-order.

4.8. Considering the above orders, this Court (Coram:Hon'ble Mr.Justice Akil Kureshi and Hon'ble Mr.Justice B.N.Karia As Their Lordships Were Then) passed the following



order on 10.05.2018 :

"1. The petitioners have challenged the demand raised by the respondents of GST on rent/license fee paid by the petitioners on shops situated at Ahmedabad International Airport. The case of the petitioner is that no GST can be levied on such rent/license fee since the shop is situated in an area which is deemed to be outside the territory of India. The petitioners relied on the judgment of the Supreme Court in case of Indian Tourist Development Corporation Limited through Hotel Ashoka Vs. Assistant Commissioner of Commercial Taxes and Anr. reported in (2012) 3 SCC 204.

2. Counsel for the petitioners pointed out that by four separate orders, three High Courts in the country have under similar situation entertained the petition and granted interim



protection against the further recovery. Our attention is also drawn to an order dated 23.04.2018 passed by the Supreme Court rejecting the Special Leave Petition against one such interim order.

3. We have perused the interim orders passed by the various High Courts under similar circumstances. We notice that these orders were passed after by-parte hearing and in one such case, viz. Punjab and Haryana High Court had imposed a condition, providing 25% bank guarantee.

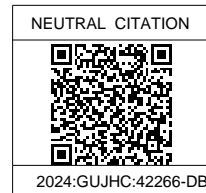
4. In view of the facts noted above, let there be Notice, returnable on 28.06.2018. By way of ad-interim relief, the respondents are prevented from recovery of GST on the rent / license fee paid by the petitioners for the shops situated at Ahmedabad International Airport. Since at present we are not imposing any further



condition for the petitioners to enjoy such interim relief, a question which we propose to deliberate upon after hearing the other side, we limit the interim relief till the returnable date."

5.1. Learned Senior Advocate Mr.Saurabh Soparkar for the petitioners submitted that during pendency of this petition, the Hon'ble Bombay High Court passed an order in case of ***Sandeep Patil versus Union of India*** reported in ***2019 (31) GSTL 398 (Bom.)*** in Public Interest Litigation Stamp No.3 of 2019 which was further taken into review wherein, the Hon'ble Division Bench of Bombay High Court by order dated October 7, 2019 held as under :

"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."

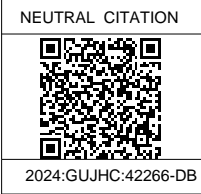
5.2. Referring to the above order of the Bombay High Court, it was pointed out by learned Senior Advocate Mr.Saurabh Soparkar



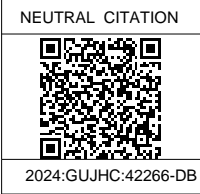
that the Central Board of Indirect Taxes by letter dated 25th June, 2020 addressed to the Principal Commissioner of CGST and Central Excise, Bombay has clarified that the proposal for filing SLP challenging the aforesaid order dated 07.10.2019 was examined and it was decided not to file SLP in the subject matter.

5.3. Learned Senior Advocate Mr.Saurabh Soparkar thereafter referred to the order passed by the Kerala High Court in case of the petitioners in Writ Petition No.6850 of 2018 wherein, the Hon'ble Kerala High Court following the decision of the Bombay High Court held as under :

"33. In W.P.(C) No.6850 of 2018, I refrain myself from giving any declaration as sought qua accessibility of GST at Calicut International Airport but since this Court had granted the



stay, which is operational during the pendency of the present writ petition, no GST is payable by respondent No.4 Airport Authority and no useful purpose would be served in directing respondents No.1 to 3 to recover any GST on concession fee till 30.06.2020, which respondent No.4 will seek to recover from the petitioner since as per Judgment dated 07.10.2019, the supply of goods by DFSs to outgoing passengers is export of goods under IGST and zero rated supply, it would entitle the petitioner(s) to claim 100% of ITC and refund thereof effective from 01.07.2020 onwards. As per the reasoning assigned in para 37 of the judgment referred to above in Sandeep Patil, the petitioner shall pay the GST on input services including Concession Fee to respondent No.4 and claim ITC of the entire tax amount and thereafter claim refund of the same by following the procedure prescribed under Section 54(3) of the Central Goods and Services Tax Act, 2017 and Kerala Goods and Services Tax Act,



2017 read with Rule 89 of Central Goods and Services Tax Rules, 2017 and Kerala Goods and Services Tax Rules, 2017."

5.4. Learned Senior Advocate Mr.Saurabh Soparkar further submitted that the Madras High Court, Madurai Bench has also followed the decision of the Bombay High Court and Kerala High Court and held that the respondent No.4 is not liable to charge GST upon the concession fees to be paid by the petitioners in view of the fact that the same would be a revenue neutral exercise as the petitioner is entitled to the refund on the Input Tax Credit in view of the Zero Rated Supply as per Section 16 of the IGST Act.

5.5. Learned Senior Advocate Mr.Saurabh Soparkar referred to the following observation of the Hon'ble Madras High Court, Madurai



Bench :

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

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

b) Since the fourth has paid GST for the period from 01.01.2018 to 31.03.2018, even though the petitioner

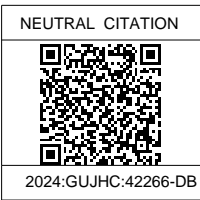


has not paid, the first respondent Chas to refund to the fourth respondent.

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

5.6. Reference was also made to the decisions dated 30th March, 2021 of the Madras High Court in case of the petitioners in Writ Petition No.4055 of 2018 and WMP No.4981 of 2018 wherein, after referring to the aforesaid Judgments and Orders, the Madras High Court held as under :

"13. These orders are based on the order passed by the Authority for Advance Ruling, Delhi in the case of M/s.Rod Retail Private Ltd. which was circulated by Central Board of Indirect Taxes and Customs vide a Communication dated



29.05.2018. Thus, the tax liability on account of supply of goods and service at the Airport Authority of India is revenue neutral issue in the hands of the petitioner having no implication on over all collection of tax as the petitioner is entitled for refund of input tax borne on various input / input services utilised at its Duty Free Shop located inside the Airports. Therefore, there is no useful purpose in directing the third and fourth respondents Airport Authority to pay the tax for the past period and thereafter, it is for the petitioner to file refund claims in Form GST RFD-01A as the incidence of tax that has to be passed on the petitioner is refundable to the petitioner.

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



chargeable and the incidence of such tax which is to be passed on the petitioner is liable to be refunded back to the petitioner.

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

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

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

iii. As the issue is revenue neutral for



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

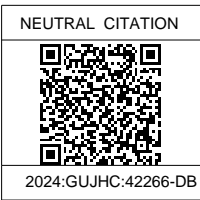
iv. It is made clear that going forward, there shall be no further concession either to the petitioner or to the third respondent from paying GST for the supply of service commencing from 1st April, 2021."

5.7. Learned Senior Advocate Mr.Saurabh Soparkar also referred to the decision of the Hon'ble Punjab and Haryana High Court pronounced on 25th January, 2024 in case of the petitioner No.1 wherein, after considering all the aforesaid Orders, the Hon'ble Division



Bench of the Punjab and Haryana High Court
held as under :

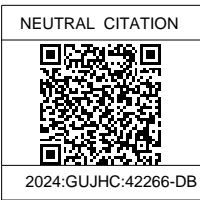
"26. In view of the discussions made hereinabove, it is directed that the petitioner will reimburse the sum of Rs.3,83,38,993/- to the respondents No.3 and 4 within a period of four weeks from date of this order, along with interest as the order dated April 30, 2018 also makes it clear that the petitioner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



eight weeks from the date of the order."

5.8. It was submitted that in the facts of the case, the respondent-Authorities have granted the refund claim of the Input Tax Credit including the services received from the respondent No.4 used towards supplies made at the Departure and Arrival Terminal made by the petitioners for the period from July, 2017 to March, 2018 and therefore, this petition for the aforesaid period has become infructuous.

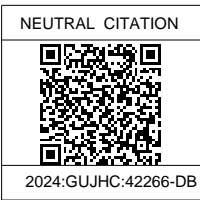
5.9. It was further submitted that in view of the interim-order passed by this Court on 10.05.2018, the petitioners did not pay the GST for the Month of May, 2018 and June, 2018 to the respondent No.4, however, respondent No.4-Office of Airport Director of Sardar



Vallabhbhai Patel International Airport, Ahmedabad charged such GST in the invoices for the month of May and June, 2018 amounting to Rs.6,11,084/-. It was pointed out that thereafter the respondent No.4 has also not charged GST in the invoices raised in view of the interim-order passed by this Court.

5.10. Learned Senior Advocate Mr.Saurabh Soparkar, under instructions, submitted that the petitioners shall pay Rs.6,11,084/- with interest at the rate of 8% per annum considering the directions issued by the Hon'ble Punjab and Haryana High Court in case of the petitioner in the aforesaid Order and thereafter, shall claim the refund on such amount from the respondent-Authority.

5.11. Learned Senior Advocate Mr.Saurabh



Soparkar also submitted that the respondent-Authoirites have sanctioned the refund of the claim made by the petitioners from April, 2018 onward, however, as the petitioners did not pay the GST to the respondent No.4, no claim was made by the petitioners qua any payment to be made to the GST.

6. On the other hand, learned Senior Advocate Mr.Shalin Mehta for the respondent Nos.3 and 4 submitted that the respondent Nos.3 and 4 are indemnified by the payment of Rs.6,11,084/- as per the statement made by the learned Senior Advocate Mr.Saurabh Soparkar for the petitioners at bar and no purpose would be served for going into the larger issue of merits of the matter as to whether the GST is leviable upon the services provided by the respondent Nos.3 and 4 under the provisions of

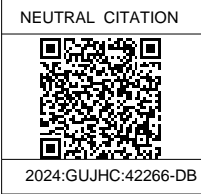


the GST Act.

7.1. Learned advocate Mr.Chirayu Mehta for the respondent Nos.1 and 2 invited the attention of the Court to the following averments made in the affidavit-in-reply filed on behalf of the respondent No.1 pursuant to the order passed by this Court on 28.07.2022 :

"4. The levy of tax for a supply of service being the leasing of space (the Duty-Free Shop (DFS)) is situated well within the territory of India, which thus entails levy of GST on the said services.

5. In the humble submission, non-levy of GST on the concession agreement in lieu of rent paid by the petitioner to respondent no.3 and the petitioner be eligible (without admitting) to claim / appropriate / adjust the unutilized input tax credit by treating it as



neutral, would defeat the very purpose and object of payment of tax and the refund of unutilized input tax credit for supplies as per the Scheme of the Act."

7.2. It was submitted that in view of the above averments made on oath by the respondent-authority and as the petitioners are entitled to the claim/appropriate/adjust the un-utilised input tax credit by treating it as neutral, there is no need to go into the larger question of levy of GST on the services rendered by the respondent No.3 and 4 of charging license/concession fee from the petitioners.

8. In view of the above submissions and considering the various Orders passed by the four different High Courts, we are of the opinion that it would be a futile exercise to



consider the larger issue of levy of GST on the services provided to the petitioners by respondent Nos.3 and 4 in view of the same being revenue neutral exercise, as the petitioners are entitled to claim/appropriate/adjust the un-utilised input tax credit in view of the zero rated supply of sale of goods at the Duty Free Shops by the petitioners on the Arrival and Departure Terminal of the International Airport.

9. Therefore, following order is passed which would meet the ends of justice:

(i) It is directed that the petitioners will reimburse sum of Rs.6,11,084/- to the respondent Nos.3 and 4 within a period of four weeks from the date of this order along with interest at the rate of 8% per annum from the date of



deposit made by the respondent Nos.3 and 4 till such time, the entire reimbursement is done to them.

(ii) The petitioners shall file necessary application in accordance with law for claiming the ITC and/or refund of the amount reimbursed to the respondent Nos.3 and 4 and other amounts refundable and the same shall be duly considered by the respondent Nos.1 and 2 within a period of eight weeks from the date of the order.

10. In view of the aforesaid directions, the petition is disposed of. Notice is discharged. No orders as to cost.

(BHARGAV D. KARIA, J)

(NIRAL R. MEHTA,J)

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