

Tax alert: Supply by Duty Free Shops to outbound passenger constitutes exports – Bombay HC

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Summary

The Supreme Court, in the erstwhile indirect tax regime, had held that when any transaction takes place outside the customs frontiers of India, it would have been said to have taken outside of India. The Bombay High Court (HC) in a recent decision, in connection with the supply of by Duty Free Shops (DFS) situated at an international airport, has held as follows:

- **Supply to outbound passengers:** Following the ratio of the SC Judgment, the Bombay HC, has held that such supply would be constituted as exports by the DFS. Consequently, such supply would be treated as zero-rated and eligible for 100% Input Tax Credit, and refund thereof.
- **Supply to arriving passengers:** The HC observed that since such supply neither crosses custom frontier nor cleared for home consumption, accordingly, neither custom duty, nor, Integrated tax, would be payable. Further, it held that in view of the amendment in the GST Law¹, sale of goods from DFS, to the incoming passengers, will not be treated as supply liable to GST.

Facts of the case

- The petitioner² filed a writ before the Bombay HC on the following questions:
 - Whether it is liable to pay GST on grant of rights and use of licensed premises in the departure or arrival area of international airport?
 - Whether credit of GST paid on input services is available to the petitioner³?
- The petitioner also challenged the denial of refund the Input Tax Credit (ITC) pursuant to sale of duty-free goods from the DFS at the departure area of the airport.

Bombay HC's observations and ruling

- **No merit in revenue's contentions:** The HC stated that there is no merit in the submission of the revenue that although the Customs Act treats the sale at DFS as export, the same cannot be ipso facto applicable under the GST laws.
- **DFS is customs area:** The customs frontier means the limits of customs area as defined under the customs law⁴. The DFS located in the customs airports and special warehouse will thus form part of the customs area⁵.
- **Supply constitutes exports:** Accordingly, the HC held that supply by the DFS from the departure area to outbound passenger constitutes exports by the DFS. Consequently, the HC held that the supply would be treated as a zero-rated supply⁶ qualified for 100% ITC, the Petitioner is eligible for the refund thereof.
- **Error by respondent:** The revenue 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.
- **Position taken by revenue authorities in other states:** The GST regime is based on "one nation, one tax" theory. The authorities in Maharashtra cannot give a discriminatory treatment, particularly when the refund has been and is being granted in several other states.

¹ with effect from 01.02.2019

² Flemingo Travel Retail Limited

³ U/s 16(1) of the CGST Act

⁴ Section 2(4) of IGST Act

⁵ as defined under section 2(11) of the Customs Act

⁶ in terms of section 16(1) of the IGST Act,

- **No GST payable:** 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.

Our comments

This is an important and welcome judgment by the Bombay HC and may hopefully put an end to long drawn litigations on matters pertaining to supply by DFS to outbound passengers. Similar judgment was given by the Allahabad HC recently wherein it had held that there shall be no tax levied in case of goods supplied to and from the DFS at arrival or departure terminals.

However, in 2018, the Delhi AAR had ruled that a retailer at Delhi's international airport will have to pay applicable GST on sales. Further, the Madhya Pradesh HC had also held that a trader supplying goods to DFS at the airport cannot be exempted from paying GST as the supply is not an export. Interestingly, the CBIC in June 2019 issued comprehensive guidelines for claiming of refund by DFS situated at the departure area of an international airport.

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