

2014 (1) ECS (214) (Tri - Del.)

Customs, Excise & Service Tax Appellate Tribunal
West Block No. II, R.K. Puram, New Delhi - 110066
Division Bench, Court No. 2

Heard and reserved on: 27.11.2013

Pronounced on: 11.02.2014

M/s ALPHA FUTURE AIRPORT RETAIL PVT LTD.

Vs.

CC (EXPORT), NEW DELHI.

Stay Application No. C/Stay/60040/2013 in

Appeal No. C/59403/2013 - Cus

Appearance:

Shri Varun K. Chopra, Advocate

For the Appellant

Shri Devender Singh, JCDR.

For the Respondent

CORAM:

Hon'ble Mr. D.N. Panda, Judicial Member

Hon'ble Mr. Manmohan Singh, Technical Member

(Stay Order No. 50419/2014)

"The appellant had premeditated design to defraud Revenue and documents were engineered with fake entries to cause duty evasion. Fraudulent passport numbers were used to fabricate record and Revenue was deceived." (Para 14, 17)

"Scrutiny of records revealed that appellant issued bills (detailed in RUD-No. 22H) without mentioning requisite details like particulars of buyer passenger, his name, passport number and nationality, his flight number and seat number etc., therein. According to customs, such act of the appellant resulted in violation of terms of Private Bonded warehouse license and mandate of Public Notice No. 05/2006 dated 27.02.2006 as well as office order No. 254/2001 dated 19.11.2001 was violated." (Para 25)

"Scrutiny of sales bills of the duty free shop operated by appellant in departure are of IGI Airport revealed that a large number of sales bills were issued in the name of one Mr. Manish who was an Indian National. Passport No, A-1425369 was mentioned against sales made to such person when was found to be fake and with change of one or more digits of that number, other fake numbers appeared in several bills. It was also found that the bills issued in the name of Mr. Manish stating the passport number as above, appeared against other names as detailed in

RUD-No.- 25. That proved unrealistic situation and making of fake sales entries on record. Such material fact came to record proving falsification and commitment of fraud against Revenue.” (Para 26)

“The false transaction of aforesaid nature were corroborated by falsification of record and receipt of sale proceeds in US\$ from undisclosed sources and such currency deposited with M/s Thomas Cook which prima facie appears to be hawala transaction and needs further investigation by Central Economic Intelligence Bureau.” (Para 31)

Per: D. N. Panda, Mr. :

In spite of repeated enquiries made by the Bench from the appellant to explain on details of bank guarantees given against each adjudicated demand made by order dated 19.08.2012 and 17.05.2013, every time, appellant confused the bench without bringing out a clear reconciliation of such guarantee against consequences of each of adjudicated demands made by two adjudication orders. Therefore enquiry was made from Id. Adjudicating Authority in this respect. Factual position was brought out by Revenue explaining details of bank guarantees given by appellant in different installments and encashment thereof made by Revenue for appropriation against demand made by adjudication order dated 19.08.2012. Copy thereof was also served on the appellant' Counsel for reply.

2. The adjudication made by order dated 19.8.2012 gave rise to aggregate demand of Rs.13.98 Crores consisting duty demand of Rs. 4.44 Crores, penalty of Rs. 4.05 Crores followed by interest of Rs. 5.47 Crores and that adjudication is in Appeal registered as No. C/4004/2012, before Tribunal.
3. Subsequent to above adjudication, an adjudication made for the period from March 2007 to October 2008 by adjudication order dated 17.5.2013 gave rise to duty demand of Rs.23,84,30,219/- and penalty of Rs.8.00 Crores followed by interest on duty demand. Such adjudication is in present appeal. While filing present appeal, stay application was also filed.
4. Revenue's repeated plea every time was that against adjudication order dated 17.5.2013 presently under appeal, no bank guarantee existed since aggregate bank guarantees of Rs.13.00 Crore given by the appellant have been encashed and appropriated against the demand arose under adjudication order dated 19.08.2012. Therefore there remained no further bank guarantee for appropriation against present duty demand of Rs.23.84 Crores, penalty of Rs. 8.00 crores followed by interest on duty demand in present appeal. Revenue therefore earnestly prayed that unless entire demand raised by the

adjudication order under appeal is directed, its interest shall be seriously prejudiced and appellant shall be unjustly enriched at the cost of exchequer.

5. Appellant at this stage says that Hon'ble High Court of Delhi in WPC No.2025/2011 by order dated 20.11.2013, has recorded that it is open to the Tribunal to appropriately deal with the amount deposited while deciding application for waiver of pre-deposit in the present appeal. It was explained by the appellant that it faced two adjudications. First adjudication order dated 19.8.2012 arose against show cause notice dated 2.7.2010. The second adjudication order dated 17.05.2013 arose against show cause notice dated 26.03.2012. Aggregate bank guarantees of Rs.13 crores were given in two instalments. Bank guarantee of Rs.4 crore given was encashed on 9.1.2013 and rest of the guarantees encashed thereafter for which the Appellant was before Hon'ble Delhi High Court in the above writ application.
6. It may be stated that while disposing stay application No.5111/2012 in appeal No. 4004/2012, Tribunal has already considered aggregate bank guarantee of Rs.13 Crores given by appellant which were encashed by Revenue by 9.1.2013, attributable to the entire demand of 13.98 Crores raised by the adjudication order dated 19.8.2012. Accordingly there remained no further bank guarantee for encashment and appropriation against the demand raised by adjudication order dated 17.5.2013 presently under appeal being consequence of outcome of SCN dated 26.3.2012.
7. *Upon hearing both sides on the issue of bank guarantee and considering aforesaid material facts it can irresistibly concluded that no bank guarantee exists for further adjustment against the demand presently under appeal. Therefore it is difficult to agree with the plea of the appellant that present demand is covered by bank guarantee. Accordingly we proceeded to dispose the stay application on the merit.*
8. When the Appellant failed on the plea of bank guarantee as above, submitted that demand arose in adjudication order dated 19.8.2012 was again raised by the adjudication order dated 17.5.2013 which is exhibited by one of the annexures to show cause notice. That reflects 305 overlapping entries. This is only one annexure and there were 6 such annexures which give rise to such situation of overlapping. But the appellant failed to demonstrate the quantum of overlapping demand while learned adjudicating authority thoroughly examined such plea in paras 52 to 59.3 of the adjudicating order and appropriately considered overlapping entries to exclude duplicacy of demand in respect of each such entry.

9. Secondly it was submitted that debit notes raised were considered to be sale by Revenue while that was not so. That gave rise to demand Rs.89 lakhs and that is apparent from adjudication order dated 17.5.2013. Ld. Adjudicating Authority dealt such plea of appellant and found that to be ill conceived.
10. It was further submitted by appellant that there was no evidence gathered by Customs to show any sale of duty free liquor to domestic passengers at all. Show cause notice was issued under section 124 of Customs Act, 1962 proposing confiscation when goods were not at all in existence and confiscation was unwarranted under the law. Such plea was also discarded by learned Adjudicationing Authority holding that there was willful contravention of law made by appellant falsifying its records to evade customs duty.
11. It was also argued on behalf of appellant that the demand raised by adjudication order dated 17.5.2013 presently under appeal is based on statement of employees who are already penalized. Those employees designed the allegation against the present appellant and made it to suffer while there was no sale of liquor to the domestic passengers. Every details were furnished to the Customs. But adjudication was made on surmises and conjecture. Duty free shop is beyond customs control for which adjudication is bad in law. Adjudications is also based on the statement of airline officers which were not reliable and appellant cannot be charged of any commission or omission under Customs Act, 1962. The appellant was also denied cross examination. So also valuation of the goods was bad and arbitrary. Prima Facie, it appears that all such pleas were found by Id. Adjudicating Authority to be devoid of merit stating sound reasons in his order.
12. Further submissions of Id. Counsel was that wrong rate of duty was applied resulting in wrong levy. If that is considered, relief shall accrue to the appellant. But no such plea could be substantiated by evidence by appellant. It was further submitted that by the appellant that solitary evidence of sale to domestic passenger shall not warrant the appellant to undergo suffering by arbitrary adjudication.
13. Arguing for Revenue, Ld. JCDR clarified the status of bank guarantee as stated herein before. The plea of excess recovery by bank guarantee raised by appellant failed. According to Revenue, Prima Facie, adjudication order reveals that there was a well designed fraud committed against Revenue which came to light when investigation and enquiry was made in depth. 51 duty free liquor bottles were sold by appellant to a domestic passenger on 08.10.2008 going to Lucknow. That revealed the truth of the fraudulent design of appellant engineered systematically causing

prejudice to the interest of Revenue. Duty free liquor is only meant for sale to foreign passengers against Passport. Making false entries in record, sales were shown to have been made to foreign passengers against passport.

14. In a number of cases where passport No.A1425369 was quoted there was no existence of any person with the name appearing in the bill issued mentioning that passport number. That was revealed by extensive enquiry made from Passport Authority. Same passport number also appeared in various bills appearing in the name of different passengers which proved fraudulent act of the appellant. Duty free liquor were sold in contravention of law deliberately. Strangely, a passport number specifying the name of passengers was shown to have travelled on the same night by different flights, which is inconceivable. The appellant had premeditated design to defraud Revenue and documents were engineered with fake entries to cause duty evasion. Revenue submitted that it was obligatory on the part of the appellant under law to report violation, if any, made by appellant while carrying out the condition of the bond. But failed to do so.
15. Ld. JCDR further submitted that Adjudicating Commissioner has not ignored the plea of overlapping demand made by appellant. He has taken every care to exclude demand attributable to adjudication order dated 19.8.2012 while passing order dated 17.05.2013.
16. It was explained by Revenue that notice was issued under section 72 of Customs Act, 1962 as there was violation of conditions of bond. When there was no goods available for seizure, there was no redemption fine imposed. Therefore appellant cannot plead that adjudication is bad. It was also submitted that when there was fraud made against Revenue that vitiates every solemn act. Therefore, not only levy of duty is justified but also levy of penalty is warranted. Interest on duty demand follows under law. The adjudication being well reasoned, that does not call for interference. Pre-deposit of entire demand may be directed to protect interest of Revenue.
17. Revenue further pleads that statement of team leaders at various level of their position in the appellant company were recorded. That corroborated with each other proving admitted fact of fraud against Revenue. Every statement revealed that duty free liquor was sold to domestic passengers and those were incriminating in nature. There was exclusive knowledge of appellant to commit fraud against Customs. That was premeditated and proved from various fake entries of sale discovered from books of account of appellant. Fraudulent passport numbers were used to fabricate record and Revenue was deceived. Annexure-A referred to in the

adjudication order exhibits total value of goods sold to passengers who had not at all travelled by respective airlines. When there was no travel by the named passenger that proved fake sales of duty free liquor against fake passport numbers. Such deliberate act of appellant defrauding Revenue does not call for any leniency to the appellant.

18. Para 59 of the adjudication order at page 114 and para 63 thereof at page 120 was placed by Revenue to prove that there was no arbitrary valuation of goods made in respect of escaped dutiable goods. Ld. Authority did not apply wrong rate of duty. Prima facie, it appears that proper adjudication order was passed ruling out all baseless pleas of appellant.
19. Ld. JCDR further submitted that all the issues raised by the appellant were considered by Ld. Authority in toto in different paragraphs of adjudication order by elaborate reasons and those were found to be devoid of merit. Therefore his reasonings can not be brushed aside to judge gravity of the evasion well designed by appellant against Revenue. All these material facts and evidence call for pre-deposit of entire duty, penalty and interest demanded by the adjudication order dated 17.5.2013.
20. Heard both sides and also gone through the materials which were relied by both sides and considered their respective pleading. We have already made certain observations while dealing pleas of appellant in the proceeding paragraphs.
21. The appellant was operating duty free liquor shops at IGI Airport, New Delhi in arrival as well as departure area since March 2007 under a Private Bonded Warehouse License (PBWL) with the conditions enumerated in Para 3 of adjudication order to make sale of imported duty free liquor to international passengers (whether outgoing or incoming or in transit) recording the name of the passenger, his passport number, flight number, obtaining signature of such passenger on the bill to comply to public notice norms prescribed Vide Notice No. 5/2006 dated 27.02.2006 (as described in 4 of adjudication order).
22. On 08.10.2008 at about 20:00 hrs, investigating Authority received an information that the appellant sold 51 duty free liquor bottles of JW Black Label brand of one litre each, from the duty free shop in Departure area of IGI Airport to 3 (three) domestic passengers scheduled to depart to Lucknow by IC-883 of Indian Airline. Those passengers were off loaded by that Airline because of huge quantity of liquor being carried by them in hand baggage and were made to return all the bottles to duty free shop.

23. Preliminary enquiry was made into the incident and statements were recorded from Shri Ritesh Tiwari who was the cashier of the shop at the relevant point of time. It came to knowledge of investigation that one of the above three passengers made payment in cash of 500 US\$ partly and through credit card for swiping 600 US \$. But no invoice was issued for the sale so made and the passenger who made payment for the liquor was one Shri Mukesh Wahi of Laxmi Nagar, Delhi.
24. Above material facts showed violation of law by appellant and paved the way for further enquiry. Investigating Authority proceeded on 09.10.2008 to physically verify the goods stored by appellant at different places. Such verification continued upto 14.10.2008 and inventory was recorded in Panchnama of each day of verification. That resulted in huge stock discrepancy.
25. Scrutiny of records revealed that appellant issued bills (detailed in RUD-No. 22H) without mentioning requisite details like particulars of buyer passenger, his name, passport number and nationality, his flight number and seat number etc., therein. A sample study of bills issued by appellant during 01.10.2008 to 08.10.2008 as tabulated in para 19.3 of adjudication order revealed deficiency of above nature ranging from 94 bills to 592 bills issued on different days of that period. Similarly table under para 19.4 of the adjudication order at page 20-21 thereof also reveal the deficiency of above nature for the sales during August 2008 to October 2008. According to customs, such act of the appellant resulted in violation of terms of Private Bonded warehouse license and mandate of Public Notice No. 05/2006 dated 27.02.2006 as well as office order No. 254/2001 dated 19.11.2001 was violated. The description in above paragraphs showed that the goods covered thereby were not sold to international passengers and evasion of customs duty was made making false entries on record.
26. Further scrutiny of sales bills of the duty free shop operated by appellant in departure are of IGI Airport revealed that a large number of sales bills were issued in the name of one Mr. Manish who was an Indian National. Passport No. A-1425369 was mentioned against sales made to such person when was found to be fake and with change of one or more digits of that number, other fake numbers appeared in several bills. It was also found that the bills issued in the name of Mr. Manish stating the passport number as above, appeared against other names as detailed in RUD-No.- 25. That proved unrealistic situation and making of fake sales entries on record. Such material fact came to record proving falsification and commitment of fraud against Revenue.

27. Enquiry further revealed that sale of goods of Rs. US \$ 1790 made on 01.09.2008 issuing 47 sale bills exhibited name of Shri Manish mentioning departure from Airport by different flights No. VS-301, JO-472, AI-310, AI-III and EK-511 as per particulars detailed by learned Adjudicating Authority in Para 20 to page 23 of the Adjudication order.
28. On 04.09.2008, the appellant recorded that sales were made to one Shri Manish through 60 sale bills said to have travelled by flights AI-306, KL 872, AI-III. TG-316, BA-142, BA-265 and SU-536. The aggregate sale made to that passenger was US \$ 3715. The passport number A1425369 which was shown against the names of Mr. Manish was also used against the names Pradeep, Jatin, Kawaljit and Tarun etc. Similarly the passport No. A1425369 used against the name of Mr. Manish on 07.09.2008 was also used against the name Mr. Goyal, Mr. Amnish and Nancy and sales bills exhibited departure by flight No. 9W-272, VS-301, AI-III and JO-472. Further, sale bill of 16.09.2008 and 20.09.2008 disclosed the same name Mr. Manish against 90 and 39 sales bills respectively and the same passport number which appeared against Mr. Manish also appeared against the names Mr. Amnishqh, Mr. Saurabh, Mr. Anil, Mr. Rahul and Mr. R. K. Chug and Mr. Manish. He was shown to have boarded flight Nos. SQ-407, CX-752, AI-1211, AI-1215, AI-III and SU-536 on 16.09.2008 and flight Nos. KL-872, BA-142, AI-III and AI-115 on 20.09.2008. Strangely some of the bills of 21.06.2008, 07.07.2008, 11.07.2008 and 29.07.2008 examined showed sale of abnormal quantity of sale of 117 bottles of liquor of Rs. US \$ 2652, 165 bottles of liquor for US \$ 3740, 189 bottles of liquor for US\$ 4708 and 180 bottles of liquor for US\$ 4080. Similar was the situation in respect of sale of 18.08.2008, 05.09.2008 and 06.10.2008. Such falsification of record was proved from the statement of Shri Manvendra Singh, cashier who was acting under the directions of Management Trainee/ Assistant Deputy Manager Shri Varun Aggarwal and Shri Hemant Bharadwaj.
29. Enquiry was made from Regional Passport officer New Delhi to ascertain genuineness of passport No. A-1425361, A 1425369, A 14253699 and A 1425326 and A 14215369. That Authority informed that no such passport numbers existed in the official record of passport office in the name of Mr. Manish.
30. Examination of different officers of different Airlines tabulated in para 29 at pages 40-43 of adjudication order revealed that no travels were made by passengers named in the number of entries appearing in the sales record of the appellant. Similarly, enquiry revealed that large number of sale entries made in sale record as tabulated under para 29 of adjudication order of page 44 mentioning the Airlines,

were found to be closed. Those entries were false. Para 30 of the adjudication also demonstrates similar situation. Entire enquiry revealed falsity of record and evasion of custom duty made by the appellant.

31. A very important fact that was also discovered by investigation was that the false transaction of aforesaid nature were corroborated by falsification of record and receipt of sale proceeds in US\$ from undisclosed sources and such currency deposited with M/s Thomas Cook which prima facie appears to be hawala transaction and needs further investigation by Central Economic Intelligence Bureau. Ld. JCDR is directed to do the needful in this regard.
32. Prima Facie, it appears that investigation calculated value of sales of Rs. 14,98,72,273.80 made by appellant in violation of conditions of bond and licence under section 59 of customs Act, 1962 as well as terms of public notice. There appears the case of wilful breach of law. Duty evasion of Rs. 23,97,95,638/- was made by the appellant. At the cost of customs, appellant appears to have been enriched. Fraud appears to have been perpetuated by appellant against Revenue which could be unearthed only when elaborate investigation and enquiry was made.
33. Examining the records of appellant minutely, learned Adjudicating authority discarded the plea of overlapping of demand made by appellant recording the reason making an extensive examination in para 57 to 59.3 at pages 101 to 114 of adjudication order. That Authority also dealt the baseless plea of the appellant that duty free shop was outside customs frontier of India in Para 60 to 63 in pages 115 to 120 of adjudication order and scrapped the same by a reasoned and logical conclusion. He examined the licence issued to appellant and bond executed by him for operating duty free shop in Arrival and Departure area of IGI Airport. Adjudication order shows that learned Adjudicating Authority has applied his mind thoroughly and examined oral as well as documentary evidence objectively which were gathered during investigation and had not acted arbitrarily. He found violation of law made by appellant causing evasion of duty making illegal sale and falsifying records. Prima Facie entire evidence on record appears to be cogent and credible. Appellant failed to demonstrate reasons to discard any of the findings of learned adjudicating authority.
34. Prima facie, the appellant did not bring out its case for total waiver of pre-deposit during pendency of appeal since right of appeal is conditioned by pre-deposit which is rule while waiver is an exception right granted by law as has been held in the case of Vijay D. Mehta - 1989 (39) ELT 178 (SC) - 1988 (4) SC 402. Balance of

convenience does not tilt in favor of the appellant. There was no case made out to show that irreparable injury or undue hardship shall be caused to the appellant if no full waiver of pre-deposit is granted. Revenue appears to be prejudiced if realization of demand is stayed. Following decision of Apex Court in Benara Valves case - 2008 (12) S.T.R. 104 (S.C.) -[2006 (204) ELT 513 (SC) and M/s. Indu Nissan Oxo Chemical Industries Ltd., Vs. UOI - 2008 (221) ELT 7 (SC) and the applicable principles set out succinctly in Silliguri Municipality and Ors. Vs. Amalen du Das and Ors. (AIR 1984 SC 653), M/s. Samarias Trading Co. Pvt Ltd., Vs, Samuel and Ors. (AIR 1985 SC 61) and Assistant Collector of Central Excise Vs. Dunlop India Ltd.,(1985)(19) ELT 22 (SC) = AIR 1985 SC (300) the stay application does not deserve any leniency.

35. While arriving at the above conclusion, we were conscious of decision of Apex Court in Ravi Gupta's case - 2009 (237) ELT-3 (SC) and particularly the principle laid down in para 10 of the judgments held as under:

"It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay-should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given".(Emphasis supplied)

36. We are reminded of the anxiety of apex court as expressed in para 7 of judgment in Dunlop India -1985 (19) ELT 22 (SC) which is reproduced below for appreciation:

"7. We have come across cases where the collection of public revenue has been seriously jeopardised and budgets of Governments, and Local Authorities affirmatively prejudiced to the point of precariousness consequent upon interim orders made by courts. In fact, instances have come to our knowledge where Governments have been forced to explore further sources for raising revenue, sources which they would rather well leave alone in the public interest, because of the stays granted by Courts. We have come across cases where an entire

service is left in a stay of flutter and unrest because of interim orders passed by courts, leaving the work they are supposed to do in a state of suspended animation. We have come across cases where buses and Lorries are being run under orders of Court though they were either denied permits or their permits had been cancelled or suspended by Transport Authorities. We have come across cases where liquor shops are being run under interim orders of court. We have come across cases where the collection of monthly rentals payable by Excise Contractors has been stayed with the result that at the end of the year the contractor has paid nothing but made his profits from the shop and walked out. We have come across cases where dealers in food grains and essential commodities have been allowed to take back the stocks seized from them as if to permit them to continue to indulge in the very practices which were to be prevented by the seizure. We have come across cases where land reform and important welfare legislations have been stayed by courts. Incalculable harm has been done by such interim orders. All this is not to say that interim orders may never be made against public authorities. There are, of course, cases which demand that interim orders should be made in the interests of justice. Where gross violations of the law and injustices are perpetrated or are about to be perpetrated, it is the bounden duty of the Court to intervene and give appropriate interim relief. In cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a Court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and bona fide with due regard to the public interest, a Court must be circumspect in granting interim orders of far reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to the Court alleging prejudice, inconvenience or harm and that prima facie case has been shown. There can be and there are no hard and fast rules. But prudence, discretion and circumspection are called for. There are several other vital considerations apart from the existence of a prima facie case. There is the question of balance of convenience. There is the question of irreparable injury. There is the question of the public interest. There are many such factors worthy of consideration. We often wonder why in the case indirect taxation where the burden has already been passed on to the consumer, any interim relief should at all be given to the manufacturer, dealer and the like:" [Emphasis supplied]

37. We make clear that we have not passed this order unmindfully. We have seen that appellant had falsified its records to cause subterfuge

to Revenue for which the goods were rightly confiscable.

38. On the aforesaid circumstances appellant is directed to deposit Rs.30 crores (Rupees thirty crores) as against duty demand of Rs. 23,84,30,219 and penalty of Rs.8.00 crores imposed followed by interest, within 4 weeks of receipt of this order and make compliance on 06.05.2014
39. Subject to compliance, realization of balance demand shall be stayed during pendency of appeal.

(Pronounced in the court on 11.2.2014)