

[2023 LiveLaw \(SC\) 673](#)

IN THE SUPREME COURT OF INDIA
INHERENT JURISDICTION

DR. DHANANJAYA Y. CHANDRACHUD; CJI., SANJAY KAROL; J., MANOJ MISRA; J.
August 18, 2023

Review Petition (Civil) No 1017 of 2023 in Civil Appeal No 2753 of 2023
Commissioner of CGST and Central Excise Mumbai East versus Flemingo Travel Retail Ltd.

Integrated Goods and Services Tax Act, 2017 - The Supreme Court has recalled its judgment dated 10 April 2023, where the Court had ruled that Duty Free Shops situated in the arrival or departure terminals of Airports are outside the customs frontiers of India and therefore, they cannot be saddled with any indirect taxes like the Service Tax. While allowing the review plea filed by the Commissioner of CGST and Central Excise against the Supreme Court's verdict in *Commissioner of CGST and Central Excise v. Flemingo Travel Retail Ltd [Civil Appeal Diary No. 24336/2022 dated 10.04.2023]*, the court observed that while hearing the appeal, none of the submissions of the Union of India had been recorded or considered, and that the judgment only adverts to the submissions of the respondent- assessee.

For Petitioner(s) Mr. N. Venkataraman, A.S.G. Mr. Mukesh Kumar Maroria, AOR Ms. Praveena Gautam, Adv. Ms. Priyanka Das, Adv. Mr. Ashok Panigrahi, Adv. Mr. H.R. Rao, Adv. Mr. Zoheb Hussain, Adv.

For Respondent(s) Mr. Mukul Rohatgi, Sr. Adv. Mr. Arunabh Chowdhury, Sr. Adv. Mr. Abhay Jadeja, Adv. Mr. Varun Satiya, Adv. Mrs. Ranjeeta Rohatgi, Adv. Mrs. Pragya Baghel, AOR Mr. Karma Dorjee, Adv. Mr. Deechen W. Lachungpa, Adv.

ORDER

- 1** The Commissioner of CGST and Central Excise seeks a review of a judgment dated 10 April 2023 in Civil Appeal No 2753 of 2023.
- 2** The appeal before this Court arises from an order dated 10 February 2022 of the Customs, Excise and Service Tax Appellate Tribunal¹ at Mumbai. The CESTAT allowed an appeal instituted by the respondent for a refund of service tax in relation to a rental transaction with the Mumbai International Airport Limited for the period 1 October 2011 to 30 June 2017.
- 3** The respondent engages in the business of conducting duty free shops at the arrival and departure terminals at the international airports at Mumbai and Delhi. The respondent filed an application claiming a refund of service tax paid in respect of the charges levied by Mumbai International Airport for the period in question on the basis of a notification² dated 29 June 2012 of the Union government in the Ministry of Finance. The adjudicating authority rejected the refund claimed on the ground that the payment of service tax on renting of immovable property of the duty free shops was not liable to be refunded in terms of the provisions of the Finance Act 1994. The order was affirmed by the Commissioner (Appeals).
- 4** In appeal, the CESTAT came to the conclusion that the duty free shops situated at international airports constitute a global market competing in a tax exempt environment and the levy of service tax was bereft of lawful authority. The CESTAT placed reliance on

¹ "CESTAT"

² No 41/2012-Service Tax

a decision of this Court in **Indian Tourist Development Corporation Limited through Hotel Ashoka v Assistant Commissioner of Commercial Taxes**³.

5 The Union Government has sought to submit that the position as it obtains in relation to goods is distinct from the applicable statutory regime in respect of services. Moreover, it has been stated in the memo of appeal that sixteen appeals involving a similar issue are pending before this Court arising from orders dated 28 September 2017 and 26 October 2018 of the CESTAT at its West Zonal Bench in Mumbai. Hence, it is urged that all the appeals ought to have been set down for hearing together. A request for tagging this appeal with the appeals pending in this Court was made.

6 In its judgment dated 10 April 2023, this Court affirmed the judgment of the CESTAT noting that against a judgment of the High Court of Judicature at Bombay dated 28 November 2018 in **AI Cuisine Pvt Ltd v Union of India**⁴, a Special Leave Petition⁵ was dismissed by an order dated 14 December 2018 of this Court.

7 During the course of the judgment of which review is sought, this Court referred to the view taken by the Kerala High Court in **CIAL Duty Free and Retail Services Ltd v Union of India** and by the High Court of Judicature at Bombay in **Sandeep Patil v Union of India**.

8 The Additional Solicitor General appearing on behalf of the Union of India submits that when the appeal of the Union of India was taken up, a request was made to tag the appeal with the companion appeals.

9 The submission of the Additional Solicitor General is borne out by the following observations contained in paragraph 16 of the judgment under review, which is extracted below:

“16. In the end, learned counsel appearing for the appellant made a passing reference to two pending appeals which according to him raises an identical issue and thus, a request was made to tag this appeal along with the pending appeals.”

10 We have perused the memo of appeal lodged by the Commissioner against the judgment of the CESTAT which formed the subject matter of the appeal as well as the grounds in the review petition.

11 Substantial grounds on law have been advanced by the Union Government during the course of oral hearing in support of its case that the applicable regime in regard to goods stands on a distinct footing from the regime applicable to the levy of service tax and later, under IGST.

12 From the judgment under review, we find that after recording the view which was taken by the CESTAT, this Court adverted to the decision of the High Court of Judicature at Bombay in **Sandeep Patil** (supra) and that of the Kerala High Court in **CIAL Duty Free and Retail Services Ltd** (supra). None of the submissions of the Union of India have been recorded or considered. The judgment only adverts to the submissions of the respondents.

13 The Additional Solicitor General submitted that the decisions of the High Court of Judicature at Bombay and the Kerala High Court pertain to goods and not to the levy of

³ (2012) 3 SCC 204

⁴ Writ Petition No. 8034 of 2018

⁵ SLP (C) 33011 of 2018

service tax on the renting of immovable property. Whether this would make any difference to ultimate outcome is debatable, and would, therefore, require substantial consideration.

14 At this stage, absent such a consideration in the judgment under review and since the issue which is raised would have large consequential ramifications, we are of the considered view that the review should be allowed.

15 Apart from the above reasons, as already noted, sixteen other appeals involving the same issue were stated in the synopsis to the paper book to be pending. The Additional Solicitor General submitted that apart from the sixteen appeals which were referred to in the memo of appeal, there are nine other appeals. The details of the above appeals are set out in the tabulated statement below:

"S. NO	Party Name	Diary No	Court	Case No.	Order Date
1	Flemingo Duty Free Shop (P) Ltd.	17544 - 2019	CESTAT West Zonal Bench at Mumbai	APP- 87234 - 2016	28-09-17
2	Flemingo Duty Free Shop (P) Ltd.	17544 - 2019	CESTAT West Zonal Bench at Mumbai	APP- 87235-2016	28-09-17
3	Flemingo Duty Free Shop (P) Ltd. 2019	17544 -	CESTAT West Zonal Bench at Mumbai	APP- 87236-2016	28-09-17
4	Flemingo Duty Free Shop (P) Ltd.	17544 - 2019	CESTAT West Zonal Bench at Mumbai	APP- 87237-2016	28-09-17
5	Flemingo Duty Free Shop (P) Ltd.	17544 - 2019	CESTAT West Zonal Bench at Mumbai	APP- 87238-2016	28-09-17
6	Flemingo Duty Free Shop (P) Ltd.	17544 - 2019	CESTAT West Zonal Bench at Mumbai	APP- 87239-2016	28-09-17
7	Flemingo Duty Free Shop (P) Ltd.	17544 - 2019	CESTAT West Zonal Bench at Mumbai	APP- 87240-2016	28-09-17
8	Flemingo Duty Free Shop (P) Ltd.	17544 - 2019	CESTAT West Zonal Bench at Mumbai	APP- 87241-2016	28-09-17
9	Flemingo Duty Free Shop (P) Ltd.	17544 - 2019	CESTAT West Zonal Bench at Mumbai	RA-85493- 2018	26-10-18
10	Flemingo Duty Free Shop (P) Ltd.	17544 - 2019	CESTAT West Zonal Bench at Mumbai	RA-85498-2018	26-10-18
11	Flemingo Duty Free Shop (P) Ltd.	17544 2019	CESTAT West Zonal Bench at Mumbai	RA-854992018	26-10-18
12	Flemingo Duty Free Shop (P) Ltd.	17544 2019	CESTAT West Zonal Bench at Mumbai	RA-855002018	26-10-18

13	Flemingo Duty Free Shop (P) Ltd.	17544 2019	CESTAT West Zonal Bench at Mumbai	RA-855012018	26-10-18
14	Flemingo Duty Free Shop (P) Ltd.	17544 2019	CESTAT West Zonal Bench at Mumbai	RA-855022018	26-10-18
15	Flemingo Duty Free Shop (P) Ltd.	17544 2019	CESTAT West Zonal Bench at Mumbai	RA-855032018	26-10-18
16	Flemingo Duty Free Shop (P) Ltd.	17544 2019	CESTAT West Zonal Bench at Mumbai	RA-855042018	26-10-18
17	Aero Art Emporium Pvt. Ltd.	3859-2019	CESTAT Delhi	A-1182007	02-01-25
18	Aero Art Emporium Pvt. Ltd.	3859-2019	CESTAT Delhi	A-1422007	02-01-25
19	Jet Airways (India) Limited	472132018	Delhi High Court	WPC-90902016	04-10-18
20	Aero Art Emporium Pvt. Ltd. Through its Director	482582018	Delhi High Court	WP (C) 6933-2015	04-10-18
21	Vasu Clothing Private Ltd.	9828-2019	Madhya Pradesh High Court	WP-179992018	17-12-18
22	Airports Authority of India	320742017	CESTAT Delhi	FO-500012015	02-01-15
23	Airports Authority of India	320742017	CESTAT Delhi	FO-500022015	02-01-15
24	Delhi Duty Free Services	257552023	CESTAT Delhi	STA 51827 of 2021, 50901 of 2020 and 50902 of 2020	28-02-23
25	Flemingo Travel Retail	257582023	CESTAT West Zonal Bench	Service Tax Application (Misc) No 85986 of 2022 in Service Tax Appeal No 85046 of 2021	15-03-2023"

16 We accordingly allow the review by recalling the judgment dated 10 April 2023. Civil Appeal No 2753 of 2023 shall stand restored to the file of the Court. The Civil Appeal shall stand tagged with the above appeals. The Registry shall obtain administrative directions so that all the appeals can be clubbed together and be heard by one Bench expeditiously.

17 Before concluding, it would be necessary to record that in the memo of appeal it has been sought to be submitted that there was a breach of the principles of natural justice and that counsel of the Union of India was not heard. The position has been disputed by Mr Mukul Rohatgi, senior counsel appearing on behalf of the respondent.

18 In the view which has been taken, it is not necessary for this Court to enter any finding on the above aspect.

19 The appeal having been restored to the file for final disposal, we direct that no coercive steps shall be taken for the recovery of the dues, pending the disposal of the appeal.