



# Duty Free Shops – Taxability under GST



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## **Introduction**

Ever since the advent of GST, the taxability of Duty Free shops has been a matter of debate and various judgements of AARs, High Courts and Supreme Courts have further added fuel to this fire. As and when the legislature and judiciary realizes the importance of ensuring that these shops stay competitive globally in terms of rates offered, some sanity is finally prevailing.

## **Nature of business of the Duty Free shops**

(a) The DFSs sells goods to international passengers, who are either leaving India (departing passengers) or arriving into India (arriving passengers). The goods – generally chocolates, perfumes, cosmetics, cigarettes, alcohol etc. are primarily imported or occasionally procured from SEZ units in India (hereinafter collectively referred to as 'the warehoused goods'). However, bulk of the sales are of the imported/warehoused goods, before they cross customs frontiers or barriers. A small percentage of the sales also are in respect of the indigenous goods procured from the domestic market.

(b) The DFSs also receive various input services such as leave and licence arrangements of areas/space, maintenance services, CHA services, professional services, etc., from different service providers located inside or outside the DFS area.

(c) There are two types of transactions which are in issue that are to be analysed-

(i) Sales by DFSs to departing passengers.

(ii) Sales by DFSs to arriving passengers,

(d) DFS has been issued a special warehouse licence under section 58A of the Customs Act. Accordingly, when the goods are imported by the petitioner into India from a

place outside India, the company files a bill of entry for warehousing under Section 46 of the Customs Act, 1962. Along with the bill of entry, company executes a bond and is issued a 'space Certificate', for physical storage of the goods into a customs bonded warehouse/special warehouse as per sections 59 and 60 of the Customs Act, 1962.

(e) When the goods move from special warehouse to DFSs, which as aforesaid, are located in a custom station and hence, is a custom area, the proper officer under the Customs Act, 1962 permits the same to be removed under physical supervision. Such goods being removed from warehouses are not allowed to be removed for home consumption.

(f) In case of sales to a departing passenger, there is a condition that such passenger shall not consume the goods until he lands at the final destination outside India, and further that such passenger shall become owner of the goods only upon reaching the final destination. So, such person is under an obligation to become the carrier of goods for export and if he is not able to board the aircraft, such goods are to be returned by him.

(g) On sale of such goods to an arriving passenger, such passenger only gets the goods cleared in terms of the Baggage Rules within the Customs law. The Duty Free shop is not allowed to move such goods for clearance home consumption.

### **History of taxability of Duty Free shops under GST**

(a) AAR Delhi in the case of Rod Retail (P) Ltd stated that supply of goods may be taking place beyond Customs Frontiers of India as defined under section 2(4) of IGST Act, 2017, however, retail outlet/duty-free shops of applicant were located in Security Hold Area of IGI International Airport, Terminal-3, hence were within territory of India as defined under section 2(56) of the CGST Act, 2017 and section 2(27) of the Customs Act, 1962. Thus, applicant was not taking goods out of India and hence its supply could not be called 'export' under section 2(5) of the IGST Act, 2017 or 'zero rated supply' under section 2(23) and section 16(1) of the IGST Act, 2017. Thereby, it was finally held

that the applicant was required to pay GST at the applicable rates on supply from duty free shops.

(b) Further, Madhya Pradesh High Court held a similar view in case of Vasu Clothing (P) Ltd vs Union of India. It was held that export of goods takes place only when goods are taken out to a place outside India, however, DFSs situated at airport could not be treated as territory out of India and further fact that assessee was selling to a supplier, who was within India and point of sale was also at India, it could not be said that assessee was exporting goods out of India. Further it was stated that the assessee was liable for payment of GST and no refund of accumulated input tax credit was available.

(c) The Allahabad HC in ATIN Krishna's case had held that supply of goods to a passenger at Departure Terminal of International Airport is 'Export'. Further, this was stated to be zero rated supplies on which Input Tax Credit was available. The HC relied on provisions of the Customs Act wherein goods stored in customs warehouse can be cleared either for Home Consumption or for Exporting. As the goods are not being cleared for home consumption when they are supplied to an outbound passenger and DFS are located outside the customs frontier, DFS should not be liable to GST.

(d) Next, the Central Government vide order dated 31st August 2018 in Aarish Altaf Tinwala (F.No. 371/142/B/2018-RA/ 1391). inter alia, held that supply of goods from the arrival DFSs is treated as an export by DFSs, and the passenger who buys from DFS and thereafter crosses the customs barrier, files import declaration and becomes importer. This position has been affirmed by the Supreme Court by rejecting the writ petition filed against this central government order, vide an order dated 10th May 2019 passed in Writ Petition (C) No. 564 of 2019 titled as Aarish Altaf Tinwala v. Union of India.

### **Current stand**

#### **Supply of indigenous goods**

(a) It was clarified by the Circular no. 106/25/2019-GST dated 29<sup>th</sup> June 2019 that sale of indigenous goods procured from domestic market by retail outlets to an eligible passenger is a "supply" under GST law and is subject to levy of Integrated tax but the same has been exempted vide notification No. 11/2019-Integrated Tax (Rate) and 01/2019-Compensation Cess (Rate) both dated 29.06.2019. Therefore, retail outlets will supply such indigenous goods without collecting any taxes from the eligible passenger.

(b) Further, it was clarified that such retail outlets shall be entitled to claim a refund of all applicable Central tax, State tax, Integrated tax, Union territory tax and Compensation cess paid by them on all inward supplies of indigenous goods received for the purposes of subsequent supply of such goods to the eligible passengers. It was further clarified that the refund to be granted to retail outlets is not on account of the accumulated input tax credit but is refund based on the invoices of the inward supplies of indigenous goods received by them. Further, such retail outlets will not be eligible for

input tax credit of taxes paid on such inward supplies and the same will have to be reversed in accordance the provisions of the CGST Act read with the rules made thereunder. It is also clarified that no refund of tax paid on input services, if any, will be granted to the retail outlets.

### **Supply of imported goods**

In an extremely important judgement of Sandeep Patil vs Union of India [2019] 110 taxmann.com 155 (Bombay), the supply made by a duty free shop to an outgoing passenger will be considered as an export. Further, the supply to a person by a duty free shop to an arriving passenger will not be taxable as it is treated as in course of import into India. The following ratio has been laid down in the given case law:

- a. As per Article 286 of the Constitution of India, no tax can be levied on the supply of goods or services where such supply is in the course of import of goods or services into or export of goods or services out of the territory of India.

- b. 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 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. Thus, before the goods were imported in the country, they had been sold at the duty-free shops of the appellant. The DFS located in the customs airports and special warehouse will thus form part of the customs area as defined under section 2(11) of the Customs Act. The goods are not considered to have been imported into India till the goods or documents of title to the goods are brought into India. Hence, as per the Constitution of India, no tax can be levied on supply of such goods in the course of their import.
- c. The destination of the goods is clearly a foreign destination. The outbound passenger only acts as a carrier on behalf of Duty Free shops till reaching the final destination. So, such sale will be considered to have been made in the form of export.
- d. The customs duty and IGST is leviable only on removal of warehoused goods from the customs area, which happens when the arriving passengers leave the custom area. Since, the goods sold by DFS to arriving passengers do not leave the customs area, DFS is neither liable to pay customs duty, nor IGST.
- e. With effect from 1st February 2019, in view of the CGST (Amendment) Act, 2018, supply of warehouse goods before clearance for home consumption have been notified/ classified as activities or transactions which shall not be treated as a supply of goods. Accordingly, effective from 1st February 2019, sale of goods from arrival DFS falls under entry 8(a) of Schedule III to CGST/SGST Act; and further, section 17(2) of the CGST Act is amended according to which

reversal of ITC pertaining to activity specified in Schedule-III is not required. Accordingly, the Petitioner is to claim ITC pertaining to arrival FS also. Once this ITC is eligible, refund of entire ITC pertaining to departure and arrival DFS is eligible, based on formula of refund prescribed in Rule 89.

- f. Arrival passengers are not required to pay taxes due to the exemption available read with the duty free allowance available under the Baggage Rules to the arriving passenger. Such import of goods by arriving passengers across custom frontier as passenger baggage is therefore an exempt supply under the GST, hence no IGST is payable by either the DFS on its imports, or on supply to arriving passengers

Thereby, the following can be summarized as regards the position of sale of imported goods:

- i. Sale of goods from arrival DFS falls under entry 8(a) of Schedule III to CGST Act. It will not be considered as taxable and will only be considered as a supply in the course of import. This is because the DFS will be considered as within the customs frontiers wherein the clearance for home consumption is not made.
- ii. Supply of goods from departure DFS is export as the outgoing passenger acts a carrier and is mandatorily required to take the goods to the foreign destination.
- iii. All the inputs and input services that accrues on these zero-rated supplies would require first payment on their procurement but their ITC will be available as a refund as per Rule 89.

### **Conclusion**

The following can be drawn as conclusion from the above background of the taxation of duty-free shops provided:

- a) In case of supply of indigenous goods, the outward supply will be treated as exempt. Also, the input tax credit on the invoices for procurement of such indigenous goods will be available as a refund. Refund is not to be provided on account of accumulated input tax credit.
- b) In case of supply of imported goods to an outgoing passenger, the supply will be considered as an export for which refund of accumulated input tax credit should be eligible
- c) In case of supply of imported goods in the arrival terminal, supply will be treated to have been made in the course of import before clearance for home consumption. No tax is leviable as this activity falls within Schedule III which is an exception to supply.





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