

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 30.07.2014

+ **W.P.(C) 4274/2010**

AIRPORT RETAIL PVT. LIMITED

....Petitioner

versus

UNION OF INDIA & ORS.

....Respondents

Advocates who appeared in this case:

For the Petitioner : Mr S. Ganesh, Sr. Adv. with Mr Anand
Sukumar, Mr S. Sukumaran, Mr Bhupesh
Kumar Pathak.

For the Respondents : Mr Rajeev Mehra, ASG with Mr Mr Mukesh
Anand for the respondent.
Ms Sonia Sharma with Ms Khyati
Sharma for R-2.
Mr Sparsh Bhargava for R-5.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The present writ petition has been filed by the petitioner challenging the constitutional validity of section 65(90a) read with section 65(105)(zzzz) of the Finance Act, 1994 as amended by the Finance Act, 2010 (hereinafter referred to as the 'Act') whereby service tax has been imposed *inter alia* on renting of immovable property by the Delhi International Airport Pvt. Ltd. ('DIAL') to the petitioner. The petitioner has

also challenged the validity of the Notification No.24/2007 dated 22.05.2007 and Circular No. 98/1/2008/ST dated 04.01.2008 issued by the Ministry of Finance, Government of India.

2. During the pendency of the present petition, the petitioner further apprehended that the service tax authorities may seek to tax the licence fees paid by the petitioner to DIAL as 'taxable service' as defined under Section 65(105)(zzm) of the Act (hereinafter referred to as the 'airport services'). Therefore, the petitioner sought to amend the writ petition and the same was allowed by this court by an order dated 19.07.2010. By way of said amendment, the petitioner added an additional plea that clause 65(105)(zzm) of the Act would be applicable only in a case where the service was being rendered to the petitioner. It was averred that in the present case, DIAL had only let out immovable property to the petitioner and this transaction could not be considered as rendering of a service. The petitioner also sought to include the following additional prayer:

“declare that no Demand for service tax can be raised on the Petitioner under section 65(105)(zzm) of the Finance Act, 1994 as amended by the Finance Act 2010 and that the Circular dated 01.07.2010 (**Annexure O**) is illegal and bad in law and null and void.”

3. The question whether imposition of service tax on renting of immovable property is *ultra vires* the Constitution of India is no longer *res integra* in view of the decision by a Full Bench of this court in **Home Solutions Retails Ltd. v. Union of India & Ors: 2011 (24) STR 129** (hereinafter referred to as '*Home Solutions Retails –II*').

4. Mr Rajeeve Mehra, learned ASG appearing for the respondent authorities pointed out that the Demand cum Show Cause Notices issued to DIAL were limited to taxing the alleged service under clause 65(105)(zzm) and not under clause 65(105)(zzzz) of the Act. He clarified that the stand of the government was that DIAL has provided service to the petitioner by permitting it, through a licence, to use and occupy space for running a duty free shop within the airport premises and this fell within the taxable service of 'airport services' under clause (zzm) of section 65(105) of the Act.

5. In view of the decision of this court in **Home Solutions Retails –II** (*supra*) and the statement made by the learned Additional Solicitor General, the only question that remains for this court to consider is whether in the given facts the transaction entered into between DIAL and the petitioner could be construed as DIAL providing services to the petitioner which fall within the meaning of 'airport services' under clause (zzm) of section 65(105) of the Act.

6. Briefly stated, the relevant facts are that DIAL and the Airport Authority of India (hereinafter referred as the 'AAI') entered into an Operation, Management and Development Agreement (hereinafter referred as the 'OMDA') dated 04.04.2006 whereby DIAL, a special purpose joint venture company established solely for the purpose of performing the objectives as determined under the OMDA, undertook to *inter alia* perform the functions of the *operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Indira Gandhi International Airport (hereinafter referred as the 'Airport') and to perform services and activities constituting Aeronautical Services,*

and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport. The AAI and DIAL also entered into a Lease Deed dated 25.04.2006 whereby the premises of the Airport was leased out to DIAL for performing the obligations as mentioned in the OMDA.

7. Subsequently, a License Agreement dated 09.11.2006 was executed between DIAL and the Alpha Airports Group PLC (Alpha Airports) & Pantaloon Retail (India) Limited (Pantaloon India) whereby a licence was granted to Alpha Airports and Pantaloon India to set up and operate duty free shops within the Airport premises. Under the said agreement, it was clarified that Alpha Airports and Pantaloon India were representing a joint venture company to be incorporated in the name of Alpha Future. Thereafter, Airport Retail India Pvt Ltd, petitioner herein (formerly known as Alpha Future Airport Retail Pvt. Ltd.) was incorporated and a settlement agreement dated 07.02.2008 was signed by the parties whereby License Agreement dated 09.11.2006 was novated in favor of the petitioner.

8. In consideration of the said licence, the petitioner was required to pay to DIAL a fixed monthly licence fee and also a share of the gross revenue generated by the various product categories which were to be sold at the said duty free shops. Pursuant to the licence granted by DIAL, petitioner established a duty free outlet at the Delhi Airport. The petitioner closed its operations at the Delhi Airport with effect from 30.06.2010.

9. The petitioner filed a writ petition (WP(C) No.8554/2008) in this court challenging the levy of service tax, on rental including royalties payable to DIAL (respondent no. 2 therein) for hiring space in the airport

premises for housing of the duty free shops, as ultra vires the Constitution of India. On 03.11.2009, this court allowed the said petition while following the judgment passed by a Division Bench of this court in **Home Solution Retail India Ltd. v. Union of India & Ors: 2009 (237) ELT (Del.)** (hereinafter referred to as '*Home Solutions Retails – I*') and *inter alia* held as follows:-

“Learned counsel for the Respondent concedes that this case is covered by Division Bench's judgment of this Court in *Home Solution Retail India Ltd. vs. Union of India, 2009 (237) ELT (Del.)*.

In that case this Court has held that Section 65(105)(zzz) [sic][recte 65(105)(zzzz)] of the Finance Act, 1994 does not in terms entail that the renting out of immovable property for use in the course or furtherance of business or commerce would by itself constitute a taxable service and be exigible to Service Tax. As a consequence of this finding, this Court held the notification and circular as ultra vires to the extent it authorized the levy of service tax on renting of immovable property per se.

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So far as Section 65(105)(zzm) is concerned, the matter is covered by the Circular dated 19th September, 2004 issued by the Central Board of Customs & Excise, which clarifies that "airport services includes only items like navigation, security and parking services and does not include the activity of cutting [sic][recte letting] out a part of the airport services [sic][recte premises]”.

10. Thereafter, Section 65(105)(zzm) of the Finance Act, 1994 was amended by the Finance Act, 2010 with effect from 01.07.2010 and Section 65(105)(zzzz) of the Finance Act, 1994 was also amended by the Finance

Act, 2010 with retrospective effect from 01.06.2007. In view of the amended clause 65(105)(zzzz), service tax was levied retrospectively from 01.06.2007 on renting of the immovable property thereby negating the effect of the judgment passed by the Division Bench of this Court in ***Home Solutions Retails - I (supra)***.

11. In view of the retrospective amendment to the provisions of the Act by the Finance Act, 2010, DIAL addressed a letter dated 03.06.2010 to the petitioner informing the petitioner about the retrospective amendment with regard to levy of service tax on the license fee/concession fee including fixed rent, royalty and revenue share etc. and called upon the petitioner to remit the entire amount of service tax w.e.f. 01.06.2007. The petitioner being aggrieved with the same preferred the present writ petition being WP(C) No.4274/2010. At the material time, a similar writ petition (***Home Solutions Retails-II (supra)***) was also pending before this court in respect of similar issues. This court, by an order dated 23.06.2010, extended the interim order dated 18.05.2010 as passed in ***Home Solutions Retails-II (supra)*** to the present writ petition.

12. During the pendency of the petition, DIAL again addressed a letter dated 28.06.2010 demanding the payment of service tax from the petitioner under section 65(105)(zzm) of the Act. The petitioner, thereafter, amended the present writ petition and also challenged the levy of service tax as 'airport services' under clause (zzm) of Section 65(105) of the Act as well as the Circular dated 01.07.2010.

13. Thereafter, the respondent revenue issued a Demand cum Show Cause Notice dated 22.10.2010 to DIAL demanding service tax from the DIAL for the period covering 2006-2007 to 2009-2010 including tax on the consideration received/receivable for providing commercial outlets and space at the airport to various parties. DIAL submitted its reply dated 20.06.2011 stating that they were paying service tax on license fee received by them after 01.07.2010 and they had not paid the service tax, prior to 01.07.2010, on the license fee pertaining to such licenses in view of the specific stay order from this Court. The respondent authorities issued another Demand cum Show Cause Notice dated 28.11.2011 to DIAL demanding the service tax for the period April 2010 to June 2010.

14. While demands on account of service tax were made on DIAL being the alleged service provider, DIAL asserted that the liability was that of the petitioner. The disputes between DIAL, petitioner and petitioner's holding company, namely, Autogrill Holdings, U.K. PLC were settled and an arbitration award dated 30.03.2011 was passed with the consent of the said parties which recorded that the service tax, interest and penalty, if any, on the transaction between DIAL and the petitioner was liable to be paid by the petitioner in terms of the arbitration award dated 30.03.2011. The petitioner does not dispute that in case service tax, interest and penalty were imposed on DIAL, the same would be paid by the petitioner.

15. This court, by an order dated 27.03.2012, confirmed the interim order dated 26.03.2010 till the disposal of the writ petition. Thereafter, DIAL filed an application (CM No.7343/2012) seeking modification of the order dated 26.03.2010 and *inter alia* sought the following relief:-

- “a. Modify the interim order dated 23.06.2010 and pass an order directing the Petitioner to deposit the amount payable towards Service Tax, interest and penalty before this Hon'ble Court or to furnish a bank guarantee in favour of the Applicant, Delhi International Airport Ltd, or the Union of India of an amount of Rs. 42,36,52,066/- comprising of Rs.17,74,24,866 as service tax payable and Rs.6,88,02,334/ as interest till date and Rs. 17,74,24,866 towards penalty and to continue to deposit periodically before this Hon'ble Court amounts towards interest accruing on the that service tax, till the disposal of the petition or periodically increase bank guarantee in favour of the Applicant in respect of the said amounts;
- b. For such further and other orders, directions and reliefs as the nature and circumstances of the case may require.”

16. DIAL also moved an application (CM No.7344/2012) *inter alia* praying discharge that the payment by the petitioner of the service tax and other liability be considered as a payment by DIAL. This court, by an order dated 05.11.2012, disposed of the said applications with a direction to the petitioner to furnish a bank guarantee of ₹42,36,52,066/- in favour of the Registrar General of this Court for securing the amount as none of the Directors of the petitioner company were within the jurisdiction of this court and the petitioner itself had no assets in this country. Furthermore, their operation in India had also been wound up on 30.06.2010.

17. The petitioner failed to comply with the said direction and had filed an application (CM No.2222/2013) seeking modification of order dated 05.11.2012. On 27.02.2013, this court directed the petitioner to furnish a bank guarantee of ₹25 crores in favour of the Registrar General of this Court as an interim measure and on 10.04.2013, which was subsequently

confirmed. The petitioner contended that the insistence of DIAL that the petitioner deposit the tax or furnish a bank guarantee was contrary to the terms of the arbitration award and, thus, the costs of the bank guarantee which was stated to be ₹1.06 crores was liable to be paid by DIAL. This question was left open by this court.

Submissions

18. Mr S. Ganesh, the learned Senior Counsel appearing for the petitioner submitted that the arrangement between the petitioner and DIAL was not a simple transaction of letting out immovable property but was an agreement between principal and principal which involved reciprocal obligations for establishment and operation of duty free shops at the airport. It was contended that the licence was granted by DIAL in order to discharge its obligations which had been delegated to DIAL by the AAI. It was submitted that the AAI had certain obligations under Section 12 of the Airports Authority of India Act, 1994 (hereinafter referred as the AAI 'Act') and it was obliged to provide facilities for passengers and provide for growth and development of the airport. The AAI was also empowered to lease the premises of the airport. It was contended that it was in pursuance to these powers that AAI had leased the airport premises to DIAL, which was a joint venture company established for development and management of the airport. The learned counsel referred to various clauses of the OMDA to indicate that the said agreement had been entered into between AAI and DIAL to carry out certain functions of AAI *"being functions of operation, maintenance, development, design, construction, upgradation, modernization, finance and management of the Airport and to perform*

services and activities constituting Aeronautical Services, and Non-Aeronautical Services (but excluding Reserved Activities) at the Airport”.

19. The non-aeronautical services were specified in Schedule 6 of the OMDA and “Duty free sales” was listed at entry No.14 of the said schedule. It was, thus, contended that the function to provide for duty free sales was an obligation that had to be performed by DIAL. DIAL in turn had granted a licence pursuant to which the petitioner established and operated a duty free outlet at the airport. The petitioner contended that the licence was in the nature of a joint venture where the licensee carried out the operations under the control and supervision of DIAL. The learned Senior Counsel referred to various clauses of the Licence Agreement, specifically as contained in Article 9 of the Licence Agreement which indicated that DIAL’s approval was required in respect of various aspects of operating the duty free outlet including pricing policy, service standards capital expenditure, etc. The licence fee payable to DIAL was also split into two components. First component was fixed at ₹15,000/- per sq. metre and the second component was a specified percentage of the gross revenue or minimum annual guarantee as specified, whichever was higher. The minimum annual guarantee for the first year was agreed at US\$13,755,719. The minimum guaranteed for the second and third year was specified as US\$31,537,703 and US\$37,873,643 respectively. It was contended that the entire agreement, read as a whole, indicated that the arrangement between DIAL and the petitioner was not one of leasing or licensing of space but was in the nature of a joint venture. It was submitted that in the given

circumstances it could not be contended that DIAL was rendering any service to the petitioner.

20. It was next contended that even if it was assumed that there was any service rendered by the DIAL, there were no machinery provisions under the Act for determining the consideration received by DIAL for the purported services or computing the quantum of service tax. The licence fee payable by the petitioner could not be stated to be the consideration for services as the agreement contained reciprocal obligations and mutual rights. The learned counsel for the petitioner referred to the decision of the Supreme Court in the case of Commissioner of Income Tax v. B.C. Srinivasa Setty: (1981) 2 SCC 460 and PNB Finance Ltd. v. Commissioner of Income Tax: (2008) 13 SCC 94 in support of its contentions that in absence of machinery provisions to compute the quantum of tax it must be presumed that the legislature did not intend to levy any tax. It was submitted that in absence of machinery provisions which enabled precise quantification of tax the charge itself was liable to fail.

21. The petitioner next contended that the authorities were seeking to tax the alleged service as 'airport services' under clause (zzm) of Section 65(105) of the Act. It was submitted that the same would be permissible only if the revenue could show: (a) that there was a service rendered by DIAL to the petitioner; and (b) that the alleged service was not covered by any other clauses of Section 65(105) of the Act. It was submitted by the petitioner that none of the two conditions had been met in the present case.

22. It was further submitted by the petitioner that even if it was assumed that DIAL had let out the premises to the petitioner, the taxable services would be covered under Section 65(105)(zzzz) of the Act and not under Section 65(105)(zzm) of the Act. Thus, in any event, no service tax was payable by DIAL on the licence granted to the petitioner under Section 65(105)(zzm) of the Act. It was contended that the demand-cum-show cause notices issued by the respondent authorities to DIAL were thus liable to be set aside to the extent that service tax was sought to be levied in respect of the transactions entered into between DIAL and the petitioner.

23. The learned counsel further submitted that the petitioner had agreed to bear any tax, interest or penalty that was levied on DIAL in respect of its transaction with the petitioner and an arbitration award had also been made by consent of parties which specifically provided that the petitioner/its holding company would bear any tax, interest or penalty that would be finally imposed on DIAL. In spite of the consent award, DIAL had filed an application seeking modification of the stay granted by this Court, and at the instance of DIAL the petitioner was required to provide a bank guarantee. The learned Senior Counsel pointed out that at the material stage the petitioner would incur a cost of ₹1.06 crores for furnishing the bank guarantee and in the given circumstances DIAL was liable to compensate the petitioner for the same.

24. Mr Rajiv Mehra, learned ASG appearing for the Union of India and respondent authorities submitted that whereas the services contemplated within the meaning of 'airport services' under clause (zzm) of section 65(105) of the Act are area specific, the services as contemplated under

clause (zzzz) of section 65(105) of the Act were activity specific. It was submitted that any service within the airport would fall within the definition of airport services. It was contended that clause 65(105)(zzzz) was activity specific and in general covered the activity of leasing or licensing use of space. It was submitted that if the said service/activity was carried out in respect of a space within the specific area of an Airport, the same would fall within the definition of 'airport services'. It was submitted that the clause (zzm) was introduced w.e.f. 10.09.2004 and with effect from the said date all services rendered within the specific area of the airport would be exigible to service tax. Since, the licence for immovable space was granted for a specific space within the specified area of the airport, the same fell within the definition of 'airport services' and were thus chargeable to service tax.

25. The learned counsel appearing for DIAL supported the contention of the petitioner that the transaction entered into between DIAL and the petitioner was on principal to principal basis and contemplated sharing of revenue, and the same could thus not be subjected to service tax.

26. It was further contended on behalf of DIAL that the question whether service tax could be levied under clause (zzm) of Section 65(105) of the Act was already decided in favour of the petitioner by an order dated 03.11.2009 passed by this Court in W.P.(C) No.8554/2008 preferred by the petitioner. It was pointed out that the petitioner had preferred a writ petition challenging levy of service tax on lease rental including charges payable to DIAL for the space rented in the Airport for housing of duty free shop, as being *ultra vires* the constitution. The said writ petition was disposed of by

an order dated 03.11.2009. This Court following its decision in ***Home Solutions Retails – I (supra)*** had allowed the writ petition. It was pointed out that while disposing of the petition, this Court had expressly held that insofar as Section 65(105)(zzm) of the Act is concerned, the said matter was covered by a Circular dated 17.09.2004 issued by the CBEC which clarified that the activity of letting out of part of the airport premises was not covered within the definition of airport services. The learned counsel appearing for DIAL submitted that in view of the statement made by the learned Additional Solicitor General that service tax on licence fee was not being levied under Section 65(105)(zzzz) of the Act, no service tax could be levied on the licence fee.

27. The learned counsel appearing for DIAL also sought to explain the reasons for approaching this Court for variation of the stay order dated 26.03.2010 granted in favour of the petitioner. It was submitted that although a consent award had been passed which specifically provided that the petitioner would bear the service tax, interest and penalty, if any, imposed upon DIAL, nonetheless certain events had taken place after passing of the consent award which prompted DIAL to seek a modification of the stay order. It was contended that, first of all, the retrospective amendment of clause (zzzz) of Section 65(105) of the Act levying service tax on letting of immovable property was upheld by a Full Bench of this Court in ***Home Solutions Retail–II (supra)***. Secondly, the Finance Act, 2012, had enacted a provision [Section 80(2)] to provide amnesty from penalty in case outstanding service tax in respect of renting of immovable property was paid within six months i.e. by November, 2012. Despite the

offer of amnesty, the petitioner had declined to discharge the said liability. It was further contended that the petitioner had also not filed an affidavit stating that any liability owed by the petitioner could be recovered from its group companies. It was submitted that in the given circumstances, DIAL had sought modification of the stay order in order to protect its rights. It was further submitted that the petitioner could not claim the cost of bank guarantee from DIAL, as the same was a condition imposed by this Court for granting of the interim relief, which was sought by the petitioner.

Analysis and findings

28. We have heard learned counsel for the parties.

29. Before proceeding further, it would be necessary to refer to the provisions of the Act and certain legislative changes that have been made thereto.

30. 'Airport services' were brought into net of tax by virtue of the Finance Act, 2004 with effect from 10.09.2004 with the introduction of clause (zzm) to section 65(105) of the Act. At the material time, the said clause read as under:

"65. Definitions. – In this Chapter, unless the context otherwise requires, --

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(105) "taxable service" means any service provided or to be provided-

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(zzm) to any person, by airports authority or by any other person, in any airport or a civil enclave;”

31. Leasing or renting an immovable property was not a taxable service at the material time. The service in relation to renting of immovable property for use in the course or furtherance of business was included as a taxable service by virtue of the Finance Act, 2007 w.e.f. 01.06.2007 and clause (zzzz) was introduced in sub-section 105 of Section 65 of the Act. The said clause as introduced by the Finance Act, 2007 read as under:

“(105) "taxable service" means any service provided or to be provided-

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(zzzz) to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.

Explanation 1.— For the purposes of this sub-clause, “immovable property” includes—

- (i) building and part of a building, and the land appurtenant thereto;
- (ii) land incidental to the use of such building or part of a building;
- (iii) the common or shared areas and facilities relating thereto; and
- (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,

but does not include

- (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
- (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
- (c) land used for educational, sports, circus, entertainment and parking purposes; and
- (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2.—For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;”

32. Circular No 80/10/2004-ST dated 17.09.2004 issued by the CBEC expressly clarified that in case a part of the airport/civil enclave premises was rented/leased out, the lease rental/lease charges would not be subject to service tax as the activity of letting out of premises would not amount to rendering any service. The relevant part of the said circular is quoted below:

“The Finance Bill (No.2), 2004 has been enacted on 10.09.2004. With the enactment of the Finance Bill, The following new services have come under the service tax levy,-

- Business exhibition services
- Airport services

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Airport services: Services provided in an airport or civil enclave, to any person by Airports Authority of India (AAI), a person authorized by it, or any other person having charge of management of an airport are taxable under this category. This includes variety of services provided to airlines, as well as for cargo and passenger handling such as security, transit facilities, landing charges, terminal navigation charges, parking and housing charges and route navigation facility charges. It would be on the gross amount chargeable by AAI or other such authorized person. Thus, charges such as royalty, license fees etc. collected by AAI from other service providers at the airport such as ground handling, security, common user terminal services etc. are chargeable to service tax. However, in case a part of airport/ civil enclave premises is rented / leased out, the rental/lease charges would not be subjected to service tax, as the activity of letting out premises is not rendering a service.”

33. The service in relation to letting out of immovable property was sought to be taxed for the first time w.e.f. 01.06.2007. In view of the above circular there can be no dispute that prior to 01.06.2007, there could be no levy of tax on the license fee payable by the petitioner as ‘airport services’. As pointed out by the learned counsel for DIAL, a Division Bench of this Court had by an order dated 03.11.2009 passed in W.P. (C) No. 8554/2008 also had held the same. The relevant part of the said order is quoted below:-

“So far as Section 65(105)(zzm) is concerned, the matter is covered by the Circular dated 19th September, 2004 issued by the Central Board of Customs & Excise, which clarifies that "airport services includes only items like navigation, security and parking services and does not include the activity of letting (sic cutting) out a part of the airport premises (sic services).”

34. In view of the above whether the transaction between DIAL and the petitioner was merely letting out of premises or whether it was an arrangement in the nature of joint venture where the petitioner had agreed to perform a part of the obligation of DIAL, would not be relevant for determining the charge of service tax on the transaction for the period prior to 01.06.2007, as even if it is assumed that the transaction was simply letting out of the immovable property as contended by the learned Additional Solicitor General, it is apparent that prior to 01.06.2007, the same was not exigible to service tax. This aspect has been conclusively decided in favour of the petitioner by the abovementioned order dated 03.11.2009.

35. Clause (zzzz) of sub-section 105 of Section 65 of the Act was amended by Finance Act, 2010 with retrospective effect from 01.06.2007 to read as under:

“(105) "taxable service" means any service provided or to be provided-

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(zzzz) to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or for furtherance of, business or commerce.

Explanation 1.—For the purposes of this sub-clause, “immovable property” includes—

- (i) building and part of a building, and the land appurtenant thereto;

- (ii) land incidental to the use of such building or part of a building;
- (iii) the common or shared areas and facilities relating thereto; and
- (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,
- (v) vacant land given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce,

but does not include

- (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
- (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
- (c) land used for educational, sports, circus, entertainment and parking purposes; and
- (d) building used solely for residential purposes and building used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2.—For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;”

36. The aforesaid amendment was upheld by this Court in ***Home Solutions Retail -II*** (*supra*). Thus, in the event the transaction between DIAL and petitioner is considered to be a simple letting out of immovable

property, as is contended by the learned ASG, then the same would be exigible to service tax as taxable service defined under Clause (zzzz) of Section 65(105) of the Act.

37. The controversy that needs to be addressed is whether the arrangement between DIAL and the petitioner could be considered as ‘airport services’, provided by DIAL to the petitioner, within the definition Clause (zzm) of Section 65(105) of the Act. In order to answer this question, it would be necessary to refer to Section 65A of the Act, which reads as under:

“65A. Classification of taxable services.

- (1) For the purposes of this Chapter, classification of taxable services shall be determined according to the terms of the sub-clauses of clause (105) of section 65.
- (2) When for any reason, a taxable service is, *prima facie*, classifiable under two or more sub-clauses of clause (105) of section 65, classification shall be effected as follows:-
 - (a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;
 - (b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, insofar as this criterion is applicable;
 - (c) when a service cannot be classified in the manner specified in clause (a) or clause (b), it shall be classified under the sub-clause which occurs first

among the sub-clauses which equally merit consideration.”

38. By virtue of the retrospective amendment under clause 65(105)(zzzz) introduced by the Finance Act, 2010, the transaction entered into between DIAL and petitioner could be subjected to service tax with effect from 01.06.2007, as taxable service defined under Clause 65(105)(zzzz), provided that the transaction was determined as a simple letting out of premises as contended by the learned Additional Solicitor General.

39. In our view, the license arrangement between DIAL and the petitioner could not be subject to service tax under Clause 65(105)(zzm) prior to 01.07.2010, as in no event could the same be considered as ‘airport services’ under Clause (zzm) of Section 65(105) of the Act. This is so, because letting of immovable property was specifically covered under Clause (zzzz) of Section 65(105) and Section 65A(2) mandates that the sub-clause which provides the most specific description would be preferred to sub-clauses providing a more general description. Indisputably, if the transaction between DIAL and the petitioner is considered merely as letting of immovable property, then by virtue of Section 65A(2)(a) the same would be considered as taxable service under Clause 65(105)(zzzz) and could not be classified as ‘airport services’ under clause (zzm) of Section 65(105) of the Act.

40. In addition to amending Clause (zzzz) of Section 65(105), the Finance Act, 2010 also brought about an amendment in Clause 65(105)(zzm). However, this amendment was not retrospective and came

into effect from 01.07.2010. The said clause as amended by Finance Act, 2010 reads as under:-

“(105) "taxable service" means any service provided or to be provided-

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(zzm) to any person, by airports authority or by any other person, in any airport or a civil enclave:

Provided that the provisions of section 65A shall not apply to any service when the same is rendered wholly within the airport or civil enclave;”

41. With the introduction of the proviso to Clause (zzm) of Section 65(105) of the Act, recourse to Section 65A was no longer available to determine whether any service rendered within the airport or civil enclave was more appropriately covered by any specific clause of Section 65(105) of the Act. Thus, after 01.07.2010, if any service which was otherwise taxable under the Act was rendered within the airport or civil enclave the same could be chargeable to service tax as ‘airport services’.

42. In view of the above discussion, even if the transaction between DIAL and the petitioner is considered as a simple letting out of immovable property, the same would not fall within the taxable service of ‘airport services’ under clause (zzm) of Section 65(105) prior to 01.07.2010. Since it is stated that the petitioner closed its operations w.e.f. 30.06.2010, the transaction between DIAL and petitioner would in any event not be exigible to tax as ‘airport services’.

43. In so far as the contention of the petitioner that the transaction between DIAL and the petitioner is in the nature of joint venture is concerned, we need not examine the same in this petition. First of all, for the reason that, there is no pleading in the writ petition to the effect that the arrangement between the petitioner and DIAL is a joint venture and is not a transaction of letting of immovable property *simplicitor*. On the contrary, the petitioner has specifically pleaded in the writ petition, that the consideration paid by the petitioner under such lease and/or agreement of lease and license were purely consideration for acquiring the occupational rights of these premises. The application for amendment of the writ petition (CM No.9320/2010) preferred by the petitioner also specifically stated that *“DIAL had only let out immovable property to the petitioner and this transaction cannot in law be considered to constitute the rendering of service.”*

44. Secondly, the question as to the nature of the transaction between DIAL and the petitioner and/or the nature and extent of participation of DIAL in the duty free shop is a question of fact which need not be examined in the writ petition in the first instance.

45. We are inclined to accept the contention canvassed by the learned Additional Solicitor General that merely because the licence fee is split into two components—one being fixed and the other based on revenue sharing, cannot by itself lead to a conclusion that the licence fee is not a consideration for use of premises. In a given circumstance, it is quite possible that lease rentals or fees for use of space may be based on the revenue that may be generated from use of the premises, in the course of

business. This would not alter the nature of transaction or the nature of interest in the immovable property that is created in favour of the lessee/licencee. The question whether an arrangement is in nature of a joint venture where two or more parties come together with their separate contribution towards a common venture, would depend on various factors including the extent of participation of the co-venturers in the joint venture. We do not propose to examine the extent of participation of DIAL in the operation of the duty free shops in the present petition, as the same is a question of fact and the writ petition is bereft of any pleading in this regard.

46. We also cannot readily accept the contention that the licence granted by DIAL to the petitioner cannot contain any element of service on account of it being a statutory obligation delegated by the AAI to DIAL. The arrangement between DIAL and the petitioner is a contractual one and whether the said contract entails providing any taxable service by DIAL to the petitioner is a question of fact and a matter of interpretation of the contract. The fact that it is mandated/agreed between the AAI and DIAL and that the airport would have duty free outlets cannot by itself lead to a conclusion that if any space is leased and/or rented for the purpose of operating a duty free outlet, the same would not constitute a service of renting of immovable property in the course or furtherance of business or commerce.

47. The next question that needs to be addressed is whether DIAL is liable to pay the cost for obtaining the bank guarantee furnished by the petitioner. By an order dated 10.04.2013, this issue was left open to be decided at the final hearing of the petition.

48. By an order dated 26.03.2010, an interim order was passed in favour of the petitioner. By virtue of the said interim order, the order dated 18.05.2010, passed in W.P. (C) 3398/2010 was also made applicable to the present case. By the said order dated 18.05.2010, this Court had directed that there would be no recovery of service tax from the petitioner as well as from other concerned respondents. Accordingly, there could be no recovery of service tax either from the petitioner or from DIAL. DIAL, thereafter, had taken recourse to arbitration proceeding against the petitioner as well as its holding company M/s Auto Grill Holding PLC. The said arbitration proceedings culminated in a consent award dated 30.03.2011 which specifically held as under:-

“(iii) Respondent shall pay to the Claimant, the entire actual amount towards – (a) Service Tax (b) Interest on Service Tax, and (c) Penalty on Service Tax as may be imposed by the Government and/ or relevant authority in relation to the invoices raised by DIAL on Alpha Airport Retail Private Limited under the Agreement within 7 days of such imposition. As the actual amount towards (a), (b) and (c) (together referred to as “Tax Liability”) cannot be ascertained as of now, in view of the litigation pending (i.e. under Civil Writ Petition No.4274 of 2010) before the High Court of Delhi, the amount calculated towards the Tax Liability is the aggregate of: -

(a) an amount of INR 177,424,866 (Indian Rupees one Hundred and Seventy-Seven Million Four Hundred and Twenty Four Thousand Eight Hundred and Sixty Six only) towards Service Tax chargeable and payable to the Government of India, which may be increased or decreased as per the assessment or demand made by the Service Tax authorities;

(b) an amount payable towards the interest on Service Tax, calculated in accordance with the applicable Service Tax rules;

(c) an amount payable towards penalty, if any, imposed on non-payment of Service Tax calculated in accordance with the applicable Service Tax rules. The Respondent shall make payment of the amount due towards the Tax Liability within 7 (seven) days of receipt of demand from the Claimant in this regard.”

49. It is apparent that the matter before the Arbitrator included the question of the liability of petitioner to pay service tax as well as the consequence of the stay order obtaining in the present writ petition at the material time. DIAL consented to an award which provided that the petitioner would pay the actual amount of service tax, interest on service tax as well as penalty that may be imposed by the Government or the relevant authority in relation to the invoices raised by DIAL on the petitioner within seven days of such imposition. The award also referred to the present writ petition. DIAL had explained that despite entering into a consent award, it had approached this Court by filing an application (CM No. 7344/2012), seeking a direction to the petitioner to make payment of the alleged service tax because of various events that had occurred after the passing of the award. First of all, it has been contended that the retrospective amendment of Clause (zzzz) of Section 65 (105) of the Act had been upheld by a Full Bench of this Court. Secondly, it was contended that the Government had introduced a provision for amnesty from penalty in the event the outstanding service tax was paid by November, 2012. It was also contended that the petitioner had refused to provide affidavits and that the liability owed by the petitioner could be recovered from its group companies.

50. In our view, none of the reasons referred to by DIAL are merited. DIAL was fully aware of the implications of the stay order granted by this Court and had consented to an arrangement as recorded in the award dated 30.03.2011. In the given circumstances, it was not open for DIAL to seek that the petitioner deposit the entire amount of service tax as the same was contrary to the consent award dated 30.03.2011. Despite having a consent award in its favour, DIAL had insisted on the petitioner securing them by a bank guarantee. In the circumstances, it is only fair that DIAL be asked to bear the cost for the bank guarantee furnished by the petitioner. The learned Senior Counsel appearing for the petitioner, had at the material time pointed out that the cost of obtaining the bank guarantee was ₹1.06 crores and the same was also recorded in the order dated 10.04.2013. There is also no dispute as to the quantum of the said cost stated to have been incurred by the petitioner. In this view, we direct DIAL to pay a sum of ₹1.06 crores, being the cost of bank guarantee to the petitioner within 30 days from date.

51. The writ petition is disposed of in the light of the above discussion and direction. The parties are left to bear their own costs.

VIBHU BAKHRU, J

BADAR DURREZ AHMED, J

JULY 30, 2014

RK/pkv