

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Delivered on: 14th February, 2017

+ **WP(C) 2516/2008 & CM No. 15832/2011**

DELHI INTERNATIONAL AIRPORT P. LTD.

..... Petitioner

Versus

UNION OF INDIA & Ors

.....Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Jayant Bhushan, Sr Advocate with Mr Tarun Gulati, Mr Sparsh Bhargava, Mr Shashi Mathews, Mr Ankit Sachdeva, Mr Rony John and Ms Rachana Yadav

For the Respondents: Mr Sanjay Jain, ASG with Mr Anil Soni, CGSC and Mr Rajul Jain, Mr Sumit Misra and Mr Naginder Benipal, Advocates for respondent Nos.1 & 2

Mr Parag P. Tripathi, Sr Advocate with Mr Anil Kathwaria and Mr Kunal Bahri for R-4

+ **WP(C) 2707/2008 & CM NO.16175/201**

MUMBAI INTERNATIONAL AIRPORT P.LTD

..... Petitioner

Versus

UNION OF INDIA & Ors

.....Respondents

Advocates who appeared in this case:

For the Petitioner: Mr P. Chidambaran, Sr Advocate and Mr S.K. Bagaria, Sr Advocate with Mr Tarun Gulati, Mr Sparsh Bhargava, Mr Shashi Mathews, Mr Ankit Sachdeva, Mr Rony John and Ms Rachana Yadav

For the Respondents: Mr Sanjay Jain, ASG with Mr Anil Soni, CGSC and Mr Rajul Jain, Mr Sumit Misra and Mr Naginder Benipal for R-1 & 2
Mr Anil Kathwaria for R-4

CORAM:

**HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE SANJEEV SACHDEVA**

JUDGMENT

SANJEEV SACHDEVA, J

1. These petitions *inter-alia* seek the relief of declaration that the provisions of Section 65(90a) and Section 65(105)(zzzz) of the said Finance Act, 1994 as amended by Finance Act, 2007 are ultra-vires Entry 18 Entry 45 and Entry 49 of List-II of Schedule VII of the Constitution of India and/or Entry 92-C read with Entry 97 of List-I of Schedule VII of the Constitution of India and/or Articles 14, 19(1)(g), 265 and 300A of the Constitution of India and/or Section 66 of the Finance Act, 1994;

2. Further a Writ of Prohibition is sought, prohibiting the Respondents or their servants, agents and subordinates from, directly or indirectly giving effect to the impugned provisions i.e. Section 65(90a) read with Section 65(105)(zzzz) of the Finance Act, 1994 as amended by Finance Act, 2007 and from charging and collecting Service Tax on the Annual Fee payable by the Petitioners (i.e. Delhi International Airport P. Ltd. {DIAL for short}, petitioner in W.P. (C) 2516/2008 & Mumbai International Airport P. Ltd {MIAL for short}, petitioner in W.P. (C) 2707/2008) to the Respondent no.4 (Airports Authority of India {AAI for short});

3. Further, quashing and setting aside of the adjudication order, being Order-In-Original No. DEL-SVTAX-ADJ-COM-035 to 038-13-14 dated 26.03.2014, to the extent it holds that benefit of CENVAT Credit is not available to the service recipient and confirms the demand of tax under Section 65 (47) of the Finance Act, 1994 under the entry “Franchise service”, is sought. "

4. Restrain is also sought against the Respondents from levying and recovering Service Tax under the impugned provision viz. Renting of Immovable Property Service and/or Franchise Services on the annual fees or any interest and/or penalty consequential thereto.

5. It may be pertinent to note, at this point, that the Respondent No. 4 Airports Authority of India (hereinafter referred to as AAI) had treated the Annual fee paid by the petitioners to AAI as chargeable to service tax under the taxing entry “Renting of Immovable Property Services”. Respondent No. 1 to 3 (the Revenue Department), in its counter affidavit and also in the impugned Order in Original, has taken the stand that the upfront fee and Annual Fee is exigible to service tax under the taxing entry “Franchise Service”.

BRIEF FACTS

6. Under the Airports Authority of India Act, 1994 it is the responsibility of the AAI to develop, operate, manage and maintain

airports in India in addition to maintaining related facilitation of air traffic control, and, other allied issues.

7. Under a policy decision of the Government of India to privatise the Airports for their better management, the AAI issued Request for Proposals (RFP for short) offering a long term Operations, Management and Development Agreement (OMDA for short) to suitably qualified, experienced and resourced parties to design, construct, operate, maintain, upgrade, modernise, finance, manage and develop the Delhi and Mumbai Airports with an intention to provide world class airport management at both these airports.

8. The consortium led by the GMR Group was selected by the AAI as the successful bidder to design, construct, operate, maintain, upgrade, modernise, finance. manage and develop the Delhi airport and the consortium led by the GVK Group was selected by the AAI as the successful bidder to design, construct, operate, maintain, upgrade, modernise, finance. manage and develop the Mumbai airport.

9. As per the policy decision of the Government of India and in terms of the respective OMDAs, both dated 04.04.2006, executed between the AAI and the Petitioners, the Petitioners have been granted the exclusive right and authority to undertake some of the functions of the AAI being the functions of operation, maintenance,

development, design, construction up gradation, modernization, finance and management of the respective Airports.

10. Article 2.1.1 of the OMDA reads as under:

“AAI hereby grants to the JVC, the exclusive right and authority during the Term to undertake some of the functions of the AAI being the functions of operation, maintenance, development, design, construction, up gradation, 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 and the JVC hereby agrees to undertake the functions of operation, maintenance, development, design, construction, up gradation, modernization, finance and management of the Airport and at all times keep in good repair and operating condition the Airport and to perform service and activities constituting Aeronautical Services and Non- Aeronautical Services (but excluding Reserved Activities) at the Airport in accordance with the terms and conditions of this Agreement (the “Grant”).”

11. The Petitioners provide various Aeronautical Services and Non-Aeronautical Services as mentioned in Schedule 5 and Schedule 6 of the OMDA respectively to various consumers. For the services provided, the Petitioners charge from the users of the services.

12. Under Article 11.1 of the OMDA, in consideration of the Grant of Rights granted under Article 2.1.1 of the OMDA, the Petitioners

have to, *inter alia*, pay an Annual Fee to AAI. The Annual Fees payable to AAI is @ 45.99% in the case of DIAL & @ 38.7% in the case of MIAL, of the projected Revenue to be received by the Petitioners.

13. The revenue share payable to AAI is paid through an escrow bank account. Under the escrow mechanism, all receipts from various sources received by the Petitioners are deposited into a Receivable Account from which they are transferred to a Proceeds Account. From the Proceeds Account, payments are first made towards statutory dues and out of the balance, AAI is paid the Annual Fees and any other amounts due to it under the OMDA. The balance is transferred to a Surplus Account, which comes to the Petitioners as their respective share of the revenue.

14. In terms of the provisions of OMDA, Respondent No.4 entered into Lease Deeds (dated 25.04.2006 in case of DIAL & 26.04.2006 in case of MIAL), whereby the AAI has leased out to the Petitioners all the land (along with any buildings, constructions or immovable assets, if any, thereon) described in Schedule – 1 of the respective Lease Deeds.

15. It is contended by the petitioners that the OMDA was executed for the grant of various rights to the Petitioner for better operation and management of the Airport and the Lease Deed was executed

separately for the grant of lease. Under the OMDA, the Annual Fee is a consideration payable for the grant of rights by AAI to the Petitioners and is not a consideration for renting of immovable property.

16. It is contended by the petitioner that in the year 2007 AAI, informed the Petitioner that the Annual Fee payable under the OMDA is subject to Service Tax under the said taxing entry as being a consideration for the leasing of Immovable property to the Petitioner. Accordingly, AAI stated that Service Tax should be added to the Annual Fee with effect from the enactment of the Finance Bill, 2007.

17. AAI by its letter dated 24.09.2007 asked the respective escrow bankers of the petitioners, under OMDA, to block the sum of Rs. 14,44,18,348/- in the case of DIAL and Rs. 13,28,10,338/- in the case of MIAL, on account of balance dues towards Service Tax on Annual Fee payable under OMDA.

18. The Petitioners protested to the said action of AAI on the ground that AAI does not render any service to the Petitioners and no Service Tax could be charged on the Annual Fee. It pointed out to AAI that it was not liable to pay Service Tax on the Annual Fees. The petitioner contended that, the liability of Service Tax could not be charged from the Petitioner and if the same was payable, AAI had to discharge the same from its own revenue share.

19. It may be noted that the constitutional validity of the taxing entry relating to “rent on immovable property” has been upheld in the case of *M/s Home Solution Retail India Ltd Vs. UOI and Ors.* **182 (2011) DLT 548.**

20. Respondent No. 1 to 3 the Revenue Department has taken a stand that the Annual Fee payable by the Petitioner to the AAI is exigible to service tax under the taxable entry relating to “Franchise Service” and not under the taxable entry of “Renting of immovable property Service”.

21. By the Order-in-Original dated 26.03.2014, the Commissioner of Service Tax adjudicated the show cause notices issued to AAI. It may be noted that as the notices were issued to AAI, no notice was issued to the petitioners. By the impugned order-in-original it has been held that the services of undertaking statutory functions of the AAI under OMDA are the services provided by AAI to the petitioners under the taxable category of “Franchise Service” specified and defined under Section 65 (105) (zze) and Section 65 (47) read with Section 65 (48) of the Act.

22. The adjudicating authority has held that the meaning of franchise is confined to the definition of the terms given in the Act itself and the right to represent the AAI by the petitioners is not necessary as per the definition clause inasmuch as it is not necessary

that the JVCs should utilize the trade mark, service mark, trade name or logo or any such symbol of the AAI by the petitioners so as to give an indication to the general public that petitioners are representing AAI. It has been held that the AAI has granted rights to the petitioners to perform those functions, which are performed by AAI itself.

23. Aggrieved by the aforesaid impugned adjudication order to the extent it confirmed the demand of tax under the head “Franchise service” and adversely affects the Petitioners, the Petitioners have challenged the same.

24. The petitioners have impugned the order-in-original and the action of the Service Tax Department in treating the Annual Fees paid by the Petitioners to AAI as exigible to service tax under the entry “Franchise Service”.

SUBMISSIONS ON BEHALF OF THE PETITIONERS

25. Learned counsel for the petitioners contended that the Upfront Fee and Annual Fees is in nature of “Revenue Share” and is not consideration for any ‘service’ and therefore, there cannot be any Service Tax leviable on the said fee. It is contended that OMDA is not a Franchise Agreement but a statutory divestation of rights to build, operate and maintain the airport in favour of the Petitioner Companies, which are joint venture companies in which the AAI itself holds 26% shares.

26. It is submitted that the functions of AAI being operation, maintenance, development, design, construction, up-gradation, modernization, finance, management etc. of the Delhi and Mumbai Airports respectively and performance of Aeronautical and Non-Aeronautical Services were divested exclusively by the AAI in favour of the Petitioners. It is contended that where there is a complete divestment of rights, it can never be a 'Franchise'.

27. It is submitted that the Petitioner Companies were required to invest their own funds to build, operate and maintain the airport and consequently get a right to charge customers for rendering aeronautical and non-aeronautical services on which the Petitioners pay Service Tax under the head "Airport services". It is contended that the Petitioners run their own operations and do not act in the capacity of a Franchisee. AAI, in addition to being a shareholder of the Petitioner Company is entitled to receive a specified percentage of the gross revenue earned by the Petitioners, which is termed as Annual Fee. In addition, AAI was paid an Upfront Fee of Rs. 150 crore each by the petitioners.

28. It is further submitted that the AAI's share is not relatable to any Franchise but is a 'revenue share' and the Annual Fees is paid out to the AAI through an escrow mechanism even before any portion of the gross revenue is received by the Petitioners. It is contended that the Annual Fees is not a 'consideration' paid by the Petitioner to AAI

for any service, but is an appropriation of Revenue by AAI even before any part of the Revenue is received by the Petitioners.

29. It is contended that the AAI has a right to receive its specified revenue share. The gross revenue is appropriated by AAI at its very source and the Petitioner receives only the balance of the gross revenue. There is no payment by the Petitioner to AAI from its funds but AAI appropriates its share from the escrow account as per the priority mentioned in the escrow mechanism. It is submitted that AAI renders no service to the Petitioners for earning this share of the revenue on which the Petitioners have already paid Service Tax under the taxing entry 'Airport Services'.

30. It is contended that the said entry to be attracted the franchisee should be granted a "representational right" to sell or manufacture goods or to provide services. It is contended that the Petitioners perform services in their own name and have not been granted any representational right by AAI to render services. The Petitioners do not carry on any activity 'on behalf of AAI'.

31. It is alternatively contended that in case, any service tax is liable to be paid then it is to be paid by the AAI from its own share of Annual fee as the amount received by it is inclusive of service tax.

SUBMISSIONS ON BEHALF OF THE AIRPORTS AUTHORITY OF INDIA

(AAI)

32. It is contended that the issue raised by the petitioners, that if any service tax is payable then it is the liability of the AAI to bear the same as the amount received by it is inclusive of service tax, is a contractual dispute and a writ petition in respect of a contractual dispute is not maintainable more so when there is an arbitration clause in the subject contracts.

33. It is contended that there can be no question of a Franchise Agreement in a case where a Government or a Government entity is permitting a private entity to perform State functions or statutory functions, which is the obligation of the State/its entity.

34. When the State or its instrumentality like the AAI proceeds under Section 12A (1) of the Act to lease the premises of the Airport to a lessee, which lessee then undertakes to perform some of the statutory functions under the said Act, then this statutory performance of the statutory obligations of AAI can never amount to a Franchise.

35. It is submitted that the definition of Franchise requires a representational right, and the lessee in such a case can never have a right to represent itself as State or its instrumentality. It is contended that it is nobody's case that factually, the Petitioners have represented themselves as AAI or have any such representational right.

36. It is contended that the very concept of “Franchise” has no applicability when it comes to the issue of revenue sharing and grant

of license by the State, wherein, the State permits a private party to do an activity for profit, which act the private party would not have any right to do but for such a grant by the State.

37. In the present case, the revenues are at the first instance deposited in the escrow account and from there to the respective accounts of the AAI and the Petitioners.

38. It is further contended that it is not enough for the contract to be a Franchise but should also be a taxable service within the meaning of Section 65(105)(z) of the Finance Act, 1994 and it thus requires that AAI ought to have provided services to the Petitioners. It is submitted that there is no service, which has been provided or is being provided by AAI to the Petitioners.

39. It is further contended that the reference to “renting of immovable property” is not at all apposite for determining the present dispute as the definition of renting immovable property under Section 65(90)(a) makes it clear that renting of immovable property includes renting, letting, leasing or similar arrangement “for use in the course or furtherance of business or commerce”. It is submitted that it is this activity of renting, which is treated as taxable service under Section 65(105)(zz).

40. However, in the present case, it is the case of the Revenue, that there is no question of attracting the provisions relating to renting of

immovable property and the Revenue is seeking to bring the OMDA under the service tax provisions as a Franchise Agreement.

SUBMISSIONS ON BEHALF OF THE DEPARTMENT OF SERVICE TAX

41. It is contended that the petitions are not maintainable as against the adjudication order and the remedy lies by way of appeal before the CESTAT.

42. It is contended that the annual fee paid by DIAL to AAI is chargeable to service tax under the Taxing Entry of “Franchise Services” as defined under section 65 (105)(zze) of Finance Act, 1994. It is submitted that the phrases “representational right” and “process identified with franchisor” are of utmost importance to understand the scope and import of the statutory provision. The phrases used by the statute are clear and definite.

43. It is submitted that the expression “representational right” has not been given any specific meaning under the Service Tax Provisions of the Finance Act. Therefore, this term should be understood in common parlance, that is, meaning right to represent. The right to represent essentially means a conferment of rights by the Franchisor to the Franchisee to do the acts, which are solely identified with it.

44. It is contended that such a franchise agreement may contain terms and conditions, which regulate the conduct of the franchisee in

the field, which is otherwise occupied by the Franchisor. It is submitted that perusal of the various clauses of the OMDA would reflect that the relationship between the parties squarely falls within the definition of the term “franchise” as used in the service tax law under the Finance Act.

45. With reference to OMDA, it is submitted that the OMDA has various elements of a franchise agreement, wherein, even though the responsibility of operating, maintaining and developing the airport has been given to the petitioners, strict standards have been prescribed for performance and an element of control has been retained by the Franchisor.

46. It is submitted that AAI is a statutory body, which has been constituted for and is identified with the function of administration and management of airports and civil enclaves in India. It is contended that this function is so unique to AAI that even without the petitioners using the trademark, service mark, and logo etc. the function of airport operation remains identifiable with AAI.

47. Relying upon the decision in **Home Solutions** (Supra) it is contended that even if a transaction between the parties is in the form of an agreement to lease or rent an immovable property for carrying out a specific purpose but leads to value addition then the same shall be amenable to the imposition of service tax.

48. It is submitted that for the purpose of the service tax law, the term ‘service’ needs to be construed in a broad sense and not in the traditional sense of the term. In the present scenario where AAI has entered into franchise agreements with the Petitioners to operate, develop and maintain the airports, there is a significant amount of value addition to the overall services being offered at the airport premises.

REASONING AND ANALYSIS

49. Since the stand of the respondent Revenue is that the Upfront Fee and Annual fee is exigible under the taxing entry “Franchise Services” and not under the taxing entry “Renting of Immovable Property Services”, we are limiting the examination to the taxing entry “Franchise Services”.

50. Section 65(47) of the Finance Act, 1994 reads as under:

“franchise” means an agreement by which the franchisee is granted representational right to sell or manufacture goods or to provide service or undertake any process identified with franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved.

51. To constitute a franchise, an agreement has to satisfy the following conditions:

(i) the franchisee must be granted a representational right to:

- (a) sell or manufacture goods, or
 - (b) provide services, or
 - (c) undertake any process identified with franchisor,
- (ii) whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved.

52. Section 65 (105) of the “Finance Act lays down that:

“taxable service” means any service provided or to be provided:-

(a).....

(zze) to a franchisee, by the franchisor in relation to franchise”

53. For a service to be taxable, it should be a service provided or to be provided by the franchisor to the franchisee in relation to the franchise. As per the Revenue, AAI is the franchisor and Petitioners are the franchisees and AAI is providing service to the Petitioners.

54. The question that arises for consideration is: whether the OMDA constitutes a franchise and if so, whether any service is being provided by AAI to the petitioners?

55. For OMDA to constitute a franchise, it would have to satisfy the requirements of Section 65(47) of the Finance Act, which *inter alia* requires that the franchisees (Petitioners) should have been granted representational right by franchisor (AAI).

56. Merely because, by an agreement, a right is conferred on a party to sell or manufacture goods or provide services or undertake a process, would not *ipso facto* bring the agreement within the ambit of a franchise. What is also required is to establish that the right conferred is a “representational right”.

57. The term “representational right” would necessarily qualify all the three possibilities i.e., (i) to sell or manufacture goods, (ii) to provide service and (iii) undertake any process identified with the franchisor.

58. A representational right would mean that a right is available with the franchisee to represent the franchisor. When the Franchisee represents the franchisor, for all practical purposes, the franchisee loses its individual identity and would be known by the identity of the franchisor. The individual identity of the franchisee is subsumed in the identity of the franchisor. In the case of a franchise, anyone dealing with the franchisee would get an impression as if he were dealing with the franchisor.

59. It would be necessary to refer to some of the terms and conditions of OMDA to ascertain as to what kind of operational right, if any, has been given by AAI to the Petitioners and what kind of services, if any, are being provided by AAI to the Petitioners.

60. Some of the relevant clauses of the OMDA are as under:

**“TRANSFER OF RIGHTS IN RELATION TO AIRPORT
ON EFFECTIVE DATE AND TRANSITION PHASE**

5.1 *Upon satisfaction or waiver, as the case may be, of the Conditions Precedent, on and from the Effective Date, the rights and obligations associated with the operation and management of the Airport would stand transferred to the JVC, who shall be solely responsible and liable for the performance of all Aeronautical Services, Essential Services and all other activities and services as presently undertaken at the Airport (other than Reserved Activities). JVC shall perform under all existing contracts and agreements between AAI or any Relevant Authority and any third party as relatable to the Airport from the Effective Date, as if JVC was an original party to such contracts and agreements instead of AAI and towards this end shall perform all responsibilities, liabilities and obligations of AAI at JVC's risk and cost (including payment obligations to counter parties). Provided however that in order to ensure smooth transfer of the Airport from the AAI to the JVC, AAI shall during the Transition Phase provide assistance to the JVC (on a best endeavour basis) in the manner provided hereinbelow.*

5.2 **Transition Phase**

(a) *The period commencing from Effective Date and terminating three (3) months thereafter shall constitute the **Transition Phase**. Provided however that in the event the activities proposed to be undertaken during the Transition Phase have not been completed within the abovementioned period of three (3) months, then the Transition Phase shall be extended by an additional period of three (3) months, and in such event, the period commencing from Effective Date and terminating six (6) months thereafter shall constitute the **Transition Phase**.*

(b) *During the Transition Phase, the following activities shall take place:*

(i) **Existing Contracts:** *The JVC shall take best efforts, and AAI shall render all reasonable assistance, to transfer/novate AAI under all existing contracts and agreements between AAI and any third party, as relatable to the Airport, with the JVC, on the principle that such transfer/novation would release AAI of all liabilities and obligations under such contracts or agreements as arising from and after the Effective Date (except those pertaining to Legacy Matters). The Parties, along with relevant third parties shall execute necessary documentation or put in place necessary arrangements for the aforesaid transfer/novation. The Parties expressly agree that in respect of existing arrangements of Indian Airlines Ltd. and Air India Ltd. for usage of land and/or building at the Airport and Public Sector oil companies in respect of common hydrant infrastructure for aircraft fuelling at the Airport, for which no express written contract has been executed or presently exists, such existing arrangements shall continue for a period of six(6) months from the Effective Date and the JVC shall during such period mutually agree with Indian Airlines Ltd., Air India Ltd. and Public Sector Oil companies in respect of such arrangements going forward. Provided however that any third party contract that cannot be specifically novated to the JVC for any reason whatsoever shall be performed by the JVC (at its own risk and cost) for and on behalf of AAI (as if the JVC was an original party to the said contracts, in place of AAI). Provided further that JVC shall indemnify and keep indemnified the AAI against any liability or costs arising under such contracts (including, for the avoidance of doubt, contracts relating to capital work-in-progress included in the list of Mandatory Capital Projects), including specifically,*

payments due to the counter-parties of such contracts or to any other Entities pursuant to such contracts. Any benefits arising from such contracts shall also vest with JVC. Nothing contained in this Articles 5.2(b)(i) shall prejudice the payment obligation of the JVC in respect of payments due from August 30, 2005 under contracts for capital work-in-progress as contained in Article 5.2 (b)(ii) hereof.

- 5.3 *At the end of the Transition Phase, JVC would operate and maintain the Airport independently.*

CHAPTER VI OPERATION SUPPORT

6.1 Operation Support

- 6.1.1 *For a period of 3 (three) years from the Effective Date (herein referred to as the “**Operation Support Period**”), AAI shall provide operational support to the JVC through the General Employees in the manner and subject to the terms provided herein (such support is hereinafter referred to as “**Operation Support**”). The estimated annual Operation Support Cost is Rs. 96 Crores (Rupees Nintey Six Crores), as per the break-up in Schedule 23.*

- 6.1.2 (i) *General Employees shall be retained at the Airport for the duration of the Operation Support Period by the AAI and shall be dealt with in the manner provided herein. In order to provide Operation Support, AAI shall procure that the General Employees perform such functions and undertake such duties, and in such capacities, as may be required by JVC, subject to compliance with Applicable Law and the existing terms of employment of such employees. For the limited purposes of provision of Operation*

Support, the AAI shall act for and on behalf of the JVC and shall direct the General Employees to undertake such functions and duties as may be reasonably directed by JVC.

(ii) JVC may require AAI to take disciplinary action against /remove from the Airport (or cause to be removed) any General Employee who:

(a) persistently fails to perform or undertake his duties and function in accordance with instructions;

(b) persists in any misconduct or lack of care or carries out duties incompetently or negligently; or

(c) persists in any conduct which affects, or which may reasonably be expected to affect, JVC's compliance with its obligations under this Agreement (including, by way of example only, its obligations to operate the Airport so as to achieve the standards set out in this Agreement)

provided, in each case, the person's acts or omissions would justify disciplinary action under the terms of his employment with AAI. Upon receipt of such complaint, AAI shall initiate proceedings against such General Employee in accordance with its rules and regulations.

6.2 Personnel

During the Transition Phase, JVC along with the Airport Operator shall put in place, in a phased manner increasing numbers of senior management (employees above the level of Deputy General Managers or equivalent of AAI on the date hereof) to manage the Airport in conjunction with existing AAI senior management (employees above the level of Deputy General Managers or equivalent of AAI on the

date hereof) at the Airport. During the Transition Phase, AAI senior management would continue to manage the Airport in conjunction with personnel of the JVC. JVC shall have the right to appoint its senior management at the Airport. Consequently upon such appointments by the JVC, AAI shall reduce (at no cost to JVC) the number of its senior management (employees above the level of Deputy General Managers or equivalent of AAI on the date hereof) located at the Airport, such that upon the expiry of the Transition Phase, no such AAI senior management (employees above the level of Deputy General Managers or equivalent of AAI on the date hereof) remain at the Airport. It is expressly understood by the parties that salary, benefits, statutory payments, perks and contribution towards terminal benefits payable to the senior management of the AAI for the duration of their deployment at the Airport during the Transition Phase shall be paid by the JVC to the AAI.

Without prejudice to the generality of the foregoing, the JVC shall engage the experts listed in Schedule 15 hereof at the Airport for the duration mentioned therein.”

8.3 Master Plan

8.3.1 The JVC shall prepare a Master Plan for the Airport setting out the proposed development for the entire Airport, planned over a 20 year time horizon. The Master Plan shall include traffic forecasts for this period and link all planned major development to these forecasts. The Master Plan shall be prepared in accordance with and include the following:

- (a) A statement of the overall development strategy and philosophy;*

- (b) *The Development Planning Principles set forth in Schedule 1 hereof.*
- (c) *Details of planned developments separately for each broad area, namely commercial development, surface transport, terminal area, runway system, environmental management (including aircraft noise);*
- (d) *Details of traffic forecasts and provide the traffic trigger points for all developments which are linked to traffic growth, indicating at what traffic level the project will be commenced and finished;*
- (e) *Vision of how the Airport and each of its precincts will look at the end of 20 years and at critical intermediate stages and the ultimate vision of the Airport, at the end of the period when it reaches capacity;*
- (f) *Report on the outcome of consultations with users, community, businesses and the government.*
- (g) *Obstacle limitation surfaces for the airport and approach and takeoff areas.*
- (h) *Noise exposure contours for areas surrounding the Airport for the traffic level forecast for the 20 year Master Plan period.*
- (i) *Such other matters that may be specified by the GOI.*

Notwithstanding anything to the contrary contained in this Agreement, the Parties hereby acknowledge and agree that nothing in this Article 8.3 shall be deemed to be an approval by AAI of any Master Plan (or any part thereof) submitted by the JVC in accordance with the aforesaid provisions, including but not limited to any minimum projected traffic. It is expressly agreed that it shall be sole responsibility and obligation of the JVC to ensure that the final Master Plan is in full compliance with the requirements of this Agreement

and is, additionally, in accordance with the parameters set out in the State Support Agreement and nothing in this Agreement shall, in any way, absolve the JVC of its obligation to ensure that the final Master Plan is in accordance with the provisions of the OMDA and the State Support Agreement or any other obligations under any of the Project Agreements.

8.4 Major Development Plan

8.4.1 The JVC shall develop the Airport in accordance with this Master Plan. The JVC must prepare a Major Development Plan for each major development or any development, which is expected to have a capital cost in excess of Rupees 100,00,00,000/- (Rupees One Hundred Crores Only) and shall ensure that each such major development is undertaken by contractors selected pursuant to a competitive bidding process. The Major Development Plan must be in accordance with the finalized Master Plan and, in the case of aeronautical developments, must be the subject of full consultation with Airport users.

8.4.2 The JVC hereby agrees to submit each Major Development Plan to the AAI for its information and MCA for its review and comments. The Major Development Plan must be submitted to the MCA for its review and comments as soon as it is prepared.

Provided, however that, notwithstanding Article 3 hereof, the JVC shall submit the Major Development Plan(s) relating to the design, development and construction of (i) terminal buildings; and (ii) parallel runways at the Airport, within six(6) months of the date hereof.

8.5.7 Contracts, Leases and Licences

(i) ***Sub-Contracting, Sub-leasing and Licensing***

- (a) *Any activity may be sub-contracted by the JVC, provided always that notwithstanding the sub-contract, the JVC retains overall management, responsibility, obligation and liability in relation to the sub-contracted Airport Service. Any such subcontracting shall not relieve the JVC from any of its obligations in respect of the provision of such Airport Services under this Agreement. It is clarified that JVC shall remain liable and responsible for any acts, omissions or defaults of any sub-contractor, and shall indemnify AAI in respect thereof. Provided however that any sub-contract involving foreign manpower or materials shall be subject to the political sensitivities of GOI.*
- (b) *AAI hereby recognizes the right of JVC to sub-lease and license any part (but not whole) of the Airport Site to third parties for the purpose of performance of its obligations hereunder.*

(ii) ***Management and Control***

- (a) *Notwithstanding anything contained in Article 8.5.7 (i) above, under no circumstances shall the JVC sub-contract the overall operation and management of the Airport and the JVC shall at all times exercise and be responsible for overall management control and supervision of the Airport through its senior management staff, irrespective of any sub-contracting of activities and/or services.*

The JVC shall further under no circumstances sub-lease or license the whole Airport Site.”

61. From the perusal of the terms and conditions of OMDA, it is clear that no representational right has been granted by AAI to the petitioners. Clause 5.1 records that the rights and obligations associated with the operation and management of the Airports have been transferred to the petitioners. The Petitioners are liable to perform all Aeronautical services, Essential Services and all other activities and services earlier undertaken by AAI. Under Clause 5.2, all existing contracts of AAI have to be novated or transferred to the Petitioners so that AAI is released of all liabilities and obligations under the contracts and agreements. Contracts which cannot be transferred or novated would be performed by the Petitioners as if the Petitioners were the original parties to the contract and the Petitioners have to indemnify the AAI of any liability or costs arising under them.

62. Clause 5.3 stipulates that at the end of the Transition Phase, the Petitioners have to operate and maintain the Airports independently. Under clause 6.1, for a period of three years AAI had to provide operation support in the form of General Employees. The General Employees have to perform such function and undertake such duties and in such capacity as may be required by the JVC. For the limited purpose of provision of Operation Support, AAI was to act for and on behalf of the Petitioners and to direct the General Employees to undertake such functions and duties as may be reasonably directed by

the Petitioners. The Petitioners could even require AAI to take disciplinary action against/remove any General Employee.

63. In terms of clause 6.2, during the transition period, the Petitioners were to employ, in a phased manner, increasing number of senior management personnel and consequently AAI was to reduce the strength of its senior management so that on the expiry of the transition period, no senior AAI management official remains at the airport.

64. In terms of clause 8.3, the Petitioners had to prepare a master plan for the Airports setting out the proposed development for the entire Airport, planned over a 20-year time horizon. The Petitioners, under clause 8.5.7, have the right to sub-contract any activity, provided they retain overall management, responsibility, obligation and liability thereof. The Petitioners also have the right to sub-lease and license any part of the Airport Site to third parties for the purpose of performance of its obligations under the OMDA. The Petitioner cannot sub-contract the overall operation and management of the Airports and have to exercise and be responsible for the overall management control and supervision of the Airport.

65. The Joint Venture agreement (OMDA) has been entered into by AAI so that the functions entrusted to AAI under the Airports

Authority of India Act can be effectively carried out. AAI has 26% equity stake in the Joint Ventures, (i.e. the petitioners).

66. The Petitioners, under the OMDA, had to develop, operate and manage the Airports. AAI handed over the demised premises (under the lease deeds) at the Airports to the Petitioners. The Petitioners have spent their own money for designing, developing, constructing, upgrading, modernizing, financing etc., of the airports. The airports are being operated, maintained and developed by the Petitioners in their own right and in their own name. The Petitioners have been granted “exclusive right and authority” to undertake the functions mentioned in para 2.1.1 and particularly those relating to 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 at the airport.

67. It is clear that the Petitioners do not undertake any process identified with AAI. The Petitioners run their own operations using their own processes, policies, methods, design, techniques etc. The sole responsibility and liability for performances of the services is that of the petitioners. AAI has completely divested its rights (other than reserved activities) to build operate and maintain the airport. Once the functions of AAI have been completely divested by it and assigned to the Petitioners, there is no question of the petitioners representing

AAI in performance of those functions. There is no representation right that has been assigned to the petitioners by AAI.

68. Further, the taxable service is not mere granting of a franchise but is where the franchisor provides service to a franchisee. For the transaction to be taxable, it is necessary that the service should be provided by the AAI to the Petitioners. It is not pointed out by the Revenue as to how and in what form service is being provided by AAI to the Petitioners. The Annual Fees paid is not because of any service rendered by AAI to the Petitioner. AAI has entrusted the petitioners with some of its functions under Section 12 of the Airports Authority of India Act and no service is being rendered by the AAI to the petitioners in performance of those functions. Perusal of clauses of OMDA clearly shows that AAI does not render any service to the petitioners.

69. Clearly, as there is no representational right conferred by AAI on the petitioners, the OMDA cannot constitute a franchise in terms of Section 65(47) of the Finance Act. Further as no service is being provided by AAI to the petitioners, there cannot be said to be any taxable service in terms of section 65(105) (zze).

70. The reliance placed by the Revenue upon the decision in **Home Solutions** (Supra) to contend that as the transaction between the parties leads to value addition to the overall services being offered at

the airport premises then it is amenable to the imposition of service tax is misplaced. The categorical stand of the Revenue is that the transaction is covered under the taxing entry “Franchise Service” and not under taxing entry “Renting of Immovable Property Services”. The requirement of the taxing entry of conferment of a representational right and provision of service by AAI to the Petitioners is absent in the present transaction, thus it does not fall within the taxing entry “Franchise Service”.

71. Since we have held that OMDA does not constitute a franchise and there is no element of taxable service, we are not examining the issue raised by the petitioners that the annual fee is inclusive of service tax and the liability if any would be that of the AAI and are also not examining that the said issue is a contractual dispute and should be relegated to arbitration in terms of OMDA. The said issues are left open.

72. AAI had sought to block the escrow account of the Petitioners on the ground that the transaction is exigible to tax under the taxing entry “Renting of Immovable Property Services”. Since the categorical stand of the Revenue is that, the transaction is not exigible under the taxing entry “Renting of Immovable Property Services” and further as we have held that the transaction does not fall within the taxing entry “Franchise Service”, the action of the AAI in blocking the Escrow account cannot be sustained.

73. In view of the above, the Writ Petitions are disposed of by holding that the OMDA does not constitute a “Franchise” in terms of Section 65(47) of the Finance Act and the transaction between the Petitioners and AAI does not constitute a taxable service in terms of section 65(105) (zze) of the Finance Act. Further, the action of the AAI in blocking the Escrow Account of the petitioners is quashed. There shall be no orders as to costs.

SANJEEV SACHDEVA, J.

February 14, 2017
HJ

BADAR DURREZ AHMED, J.