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

\+ W.P.(C) 6933/2015

AERO ART EMPORIUM PVT. LTD. ..... Petitioner

Through: Mr.Ruchir Bhatia, Advocate.

versus

COMMISSIONER OF SERVICE TAX, DELHI & ORS. ..... Respondents

Through: Mr.Sameer Jain, Standing Counsel with Ms.Anu, Advocate for R-1 and R-3.
Mr.Anil Kathuria, Sr. Standing Counsel for R-2.

\+ W.P.(C) 9090/2016 & CM APPL. 36822/2016

JET AIRWAYS (INDIA) LIMITED & ANR. ..... Petitioners

Through: Mr.S.K.Bagaria, Sr. Adv. with Mr.U.A. Rana and Mr. Himanshu Mehta, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr.Sarat Chandra, Advocate for R-1.
Mr.Harpreet Singh, Sr. Standing Counsel for R-2 and R-3 with Ms.Suhani Mathur, Adv.
Mr.Anil Kathuria, Standing Counsel for R-4.
Mr.Tarun Gulati, Mr.Anupam Mishra and Mr. Aparsh Bhargav, Advocate for R-5.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

<u>O R D E R</u>

%   **04.10.2018**

1 These writ petitions challenge the order of the CESTAT dated 02.01.2015. Petitioners claim that the levy of service tax for the period prior to 01.06.2007 qua the activities which were sought to be taxed under the Finance Act, 1994 are varied and diverse: including letting out a portion of the Delhi Airport (ticket counter, check-in counter, cash counter and staff rooms) and other commercial spaces let out for vending and providing services to the passengers, public as well as employee of the airlines and other individuals who frequently visit the airport. It is not in dispute that prior to 01.06.2007 letting out and renting out of Airport premises *per se,* was not subjected to express service tax levy. The Service Tax Authority had in various kinds of litigation sought to tax such letting out contending that there was "Airport Services" and therefore subjected to levy by virtue of Section 65(105) (zzm) which was inserted into the Finance Act w.e.f. 10.09.2004. It is again not in dispute that letting out and renting out of the premises became subject to levy w.e.f. 01.06.2007 (with the introduction of Clause (zzzz) to Section 65(105) of the Finance Act.

2 Petitioners relied upon certain judgments of this Court (*Flemmingo Duty Free Shops Vs. Union of India*, 2012 (28) (STR) 49 Delhi; *C.Sadanandan Vs. Airport Dir Airports Authority of India And Anr.* WP(C) 4653/2011 decided on 27.02.2012). Broadly these two judgments as well as others judgments that followed it and held that

letting out of various portions of Airport premises *per se* did not attract service tax levy.

3 The decision of the Division Bench of this Court in *Home Solutions Retails (India) Ltd. Vs. Union of India & Ors.* 158 (2009) DLT 722, resulted in parliamentary intervention to the amendment to Section 65(105)(zzm) - with retrospective effect sometime in 2010 that was considered in a subsequent judgment by the Full Bench (*Home Solutions Retails (India) Ltd. Vs. Union of India* reported as 182(2011) DLT 548).

4 In the background of these circumstances, the writ petitioners complain that the CESTAT ignored several binding rulings of this Court notably the decision in *Flemmingo* (supra), *Airport Retail Pvt. Ltd. Vs. Union of India and Others* WP(C) 4274/2010 pronounced on 30.07.2014 and *C.Sadanandan* (supra), therefore approached this Court seeking an appropriate direction. The present writ petitions were entertained and heard from time to time. Apparently, in the meanwhile the Airport Authorities approached the Supreme Court – albeit in a belated appeal under Section 35L of the Central Excise Act in October, 2017 (CA Diary No.32074/2017) challenging the order of the CESTAT dated 02.01.2015. The previous decision of this Court in *Flemmingo* (supra) and *C.Sundaram* (supra) are the subject matter of appeals before the Supreme Court. The website of the Supreme Court also discloses that a similar appeal by the Revenue, from a judgment of Kerala High Court too is pending.

5 The facts relating to the filing and pendency of the appeals

came to light, in the course of hearing on 08.01.2017. The Predecessor Bench had enquired from the petitioner that as to why the present petition ought not to be rejected on the ground of availability of alternative remedy given that the same impugned order is a subject matter of challenge in an appeal. Learned counsel for the petitioners urged this Court not to feel constrained by the pendency of the appeal and apparently can exercise its writ jurisdiction for several reasons. It was urged that the appeal filed by the Airport Authority of India squarely urged the question which was sought to be agitated in these proceedings; more seriously it was argued that the CESTAT's view is perverse inasmuch as it has expressly disregarded the binding decision in *Flemmingo* (supra), *Airport Retail Pvt. Ltd. Vs. Union of India* WP(C) 4274/2010 pronounced on 30.07.2014 and *C.Sundaram* (supra). It is also urged that the Revenue in no manner would be prejudiced since the appeals were primarily filed by the Airport Authority and not by the petitioners who were not subject primarily to the lis.

6 This Court is of the opinion that since the question as to the correctness of the view expressed by the CESTAT on 02.01.2015 in the order impugned in these writ petitions is primarily the subject matter of appeal, the propriety requires that these writ proceedings should not be entertained. Undoubtedly, the CESTAT's approach in ignoring the decision of this Court is a matter of serious concern; as a tribunal being subordinate to and subject to the control of this court

under Article 226, it was not expected to overlook or disregard the binding decision. Yet that circumstance alone cannot compel us to exercise discretion to entertain these writ proceedings given that the impugned order in these proceedings is primarily a subject matter of appeal before the Supreme Court. Furthermore, the other orders – previously made in *Flemmingo* (supra), *Airport Retail Pvt. Ltd.* (supra) and *C.Sundaram* (supra) are also at large in essence as they are subject matter of Revenue's appeal.

7 For the above reasons, this Court is of the opinion that these writ petitions should not be entertained. It is open to the writ petitioners to seek appropriate remedy in accordance with law. The writ petitions are disposed of in the above terms.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

OCTOBER 04, 2018
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