IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	28.11.2022
Pronounced On	16.02.2023

CORAM

THE HON'BLE **MR.JUSTICE S.VAIDYANATHAN**
AND
THE HON'BLE **MR.JUSTICE C.SARAVANAN**

W.P.No.34128 of 2007
and
M.P.No.1 of 2007

VKC Credit and Forex Services (P) Ltd.,
"Aishwareya Complex"
No.1, West Road, West C.I.T. Nagar,
Chennai – 600 035.
Rep. by its Managing Director
Mr.R.Venkatasubramanian ... Petitioner

Vs

1.The Union of India,
Rep. by its Secretary, Ministry of Finance,
Department of Revenue,
North Block, New Delhi – 110 001.

2.The Central Board of Excise and Customs,
Dept. of Revenue, Ministry of Finance,
Government of India,
North Block, New Delhi – 110 001.

3.The Director General of Service Tax,
9th Floor, Piramal Chambers,

Jijibhoy Lane, Lal Bagh
Parel, Mumbai – 400 012.

4.The Airports Authority of India
having its office at Rajiv Gandhi Bhavan
Safdarjung Airport, New Delhi.

5.The Director,
Airport Authority of India,
Chennai Airport, Meenambakkam,
Chennai – 600 027.

6.The Deputy General Manager – Commercial
Airport Authority of India
Chennai Airport, Meenambakkam,
Chennai – 600 027. ... Respondents

Writ Petition filed under Article 266 of the Constitution of India, for issuance of a Writ of Declaration to declare that the levy, imposition, demand or collection of service tax from the petitioner by the respondents herein for the payment of license/rental fee paid by the petitioner to the fifth respondent herein as unconstitutional and consequently for issuance of a Writ of Mandamus to forbear the respondents, their men, agents, sub-ordinates or anyone claiming under them from in any manner imposing, levying, demanding or collecting service tax from the petitioner towards the rent/license fee paid by the petitioner to the fifth respondent other than by authority of law.

For Petitioner : Mr.Krishna Srinivas
for M/s.Ramasubramaniam Associates

For R1 to R3 : Mr.A.P.Srinivas
Senior Standing Counsel

For R4 to R6 : Mr.R.Parthiban

ORDER

S.VAIDYANATHAN, J.
and
C.SARAVANAN, J.

The petitioner has filed this Writ Petition for issuance of:-

i. Writ of Declaration to declare that the levy, imposition, demand or collection of service tax from the petitioner by the respondents herein for the payment of license/rental fee paid by the petitioner to the fifth respondent herein as unconstitutional, and
ii. Writ of Mandamus to forbear the respondents, their men, agents, sub-ordinates or anyone claiming under them from in any manner imposing, levying, demanding or collecting service tax from the petitioner towards the rent/license fee paid by the petitioner to the fifth respondent other than by authority of law.

2. When this case was taken up for hearing, it was informed that the Registry *vide* its Roc.No.104/2011 (Writs), dated 14.07.2011 has transferred the original records in respect of W.P.Nos.23431, 41293, 47104 to 47106 & 39719 of 2006 and 1479 of 2007 to the Delhi High Court pursuant to the order dated 11.04.2011 of the Hon’ble Supreme

Court in Transfer Petition (Civil) No.236 of 2007. However, W.P.Nos.45029 & 1479 of 2006 could not be transferred, since they had already been disposed of.

3. Apart from the above, *vide* letter dated 15.07.2011, the Registry of this Court has also transferred the records of W.P.No.21700 of 2007 to the Delhi High Court pursuant to the direction of the Hon'ble Supreme Court. It was informed that the present Writ Petition was however not transferred.

4. It was also informed that the Delhi High Court, in turn, had remitted the cases before the Tribunal Court. The Tribunal by its order dated 02.01.2015 in **Airport Authority of India** Vs. **Commissioner of Service Tax, Delhi,** 2015 (39) STR 35 (Tri. - Del)), has passed a detailed order under the provisions of the Finance Act, 1994 (Chapter V - Service Tax).

5. The specific case of the petitioner is that the fifth respondent has not provided any taxable service to the petitioner during the period

between **10.09.2004** and **01.06.2007** and therefore, the attempt of the fourth, fifth and sixth respondents to fasten the service tax liability on the petitioner by passing on the incidence of tax on the petitioner under Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V - Service Tax) was unsustainable and contrary to law.

6. It is submitted that the fourth respondent herein had rented out a portion of its property within the Airport/Civil Enclave to the petitioner for its Forex business. It is submitted that renting of immovable property was made liable to service tax only with effect from 01.06.2007 with introduction of Section 65(105)(zzzz) of the Finance Act, 1994 (Chapter V - Service Tax) read with the definition of "renting of immovable property" in Section 65(90a) of the Act.

7. It is further submitted that though Section 65(105)(zzzz) of the Finance Act, 1994 (Chapter V - Service Tax) was introduced w.e.f. 01.06.2007, it was amended and substituted with retrospective effect by Finance Act, 2010 as notified *vide* Notification No.24/2010-ST, dated 22.06.2010.

8. It is submitted that between **10.09.2004** and **01.06.2007**, only Section 65(105)(zzm) of the Act was in force. At that point of time, the CBEC *vide* its Circular No.80/10/2004-ST dated 17.09.2004 had clarified that only service provided by the Airports Authority of India or persons authorized by it would be liable to service tax and that service tax would not be attracted on rental/lease charges within Airport/Civil Enclave premises. Based on this circular, no service tax was payable for letting out space in Airport/Civil Enclave premises to the petitioner. A reference was made to the following decisions:-

i. **Flemingo Duty Shops Private Limited**. Vs. **Union of India and Ors.**, 2012 (28) STR 449 (Del);
ii. **Sahara Airlines Limited.** Vs. **Union of India**, in W.P.(C) No.7145 of 2011 passed by the Bombay High Court.
iii. **CCE.** Vs. **Cochin International Airport**, 2011 (24) STR 20 (Ker).

9. It is further submitted that from 01.06.2007 to 01.07.2010, Section 65(105)(zzzz) and Section 65(90a) of the Finance Act, 1994 (Chapter V - Service Tax) were in force, whereby, the letting out of property became exigible to service tax. Also, during this period, the proviso to Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V - Service Tax) had not been introduced. Further, it is submitted that

Section 65A would be only applicable for services rendered within Airport/Civil Enclave.

10. It is submitted that Section 65(105)(zzzz) of the Finance Act, 1994 (Chapter V - Service Tax) was more specific. Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V - Service Tax) was not applicable to renting of space in Airport/Civil Enclave between 10.09.2004 to 01.06.2007. This view has been taken by the Hon'ble Delhi High Court in **Airport Retail Pvt. Limited** Vs**. Union of India**, 2014 (35) STR 659 (Del).

11. It is submitted that the above judgment was taken up on appeal and upheld by the Hon'ble Supreme Court in **Delhi International Airport Limited** Vs. **Union of India and Others**, (2014) 16 SCC 405.

12. On behalf of the petitioner, the decision of the Tribunal in **Airport Authority of India** Vs. **Commissioner of Service Tax, Delhi,** 2015 (39) STR 35 (Tri. - Del)) was sought to be distinguished. A reference was made to paragraph 12.3.1, wherein, it was observed that

Rent/Lease Charges from money changers are in the *nature of rental of immovable property* inside Airports/Civil Enclave.

13. It is further submitted that the decision in **Flemingo Duty Shops Private Limited**. Vs. **Union of India and Ors**, 2012 (28) STR 449 (Del), referred to *supra* was based on concession.

14. It is further submitted that the decision of the Tribunal in **Airport Authority of India** Vs. **Commissioner of Service Tax, Delhi,** (2015 (39) STR 35 (Tri. - Del)) has been appealed by the Airport Authority of India before the Hon'ble Supreme Court in C.A.Diary No.32074 of 2017 and S.L.P.Nos.1458 and 4812 of 2018 and these appeals are pending before the Hon'ble Supreme Court.

15. Per contra, the learned counsel for the respondents has placed reliance on the decision of the Hon'ble Supreme Court in **Poulose, Sparkway Enterprises** Vs. **Commissioner of Central Excise and Customs**, (2011) 2 SCC 230, wherein, in paragraph 6, the Hon'ble Supreme Court has held as under:-

> "*6. As per clause (105) (zzm) of Section 65 of the Finance Act, 1994 "taxable service" means any service provided to any person, by the Airports Authority or any person authorized by it, in an airport or a civil enclave. As per clause (3-d) of Section 65 of the Finance Act, 1994 "airports authority" means AAI constituted under Section 3 of the Airports Authority of India Act, 1994 and also includes any person having charge of management of an airport or a civil enclave."*

16. A reference was also made to paragraph 15, wherein, the Hon'ble Supreme Court after referring to the definition of "taxable service" in Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V - Service Tax) has observed as under:-

> "*15. Albeit, it is true that the appellant deposits a licence fees of Rs.2,66,797 per month to AAI but it collects the required fees from the users of the facility and provides all facilities to such customers. Section 65 Clause (105) (zzm) of the Finance Act, 1994 defines "taxable service" to mean any person, by Airports Authority or any person authorized by it, in an airport or a civil enclave.* ***It is thus crystal clear that the appellant being a person authorized by AAI to provide service in express terms and conditions, it becomes liable to pay such tax as it was an authorized person to provide taxable service and collect the admission ticket charges on a contract basis."***

17. By way of rejoinder, the learned counsel for the petitioner would submit that the decision of the Hon'ble Supreme Court in the above case cannot be applied to the facts of the case. It is submitted that a dispute in the said case was confined to an agreement entered into between Airport Authority of India and the appellant therein.

18. By virtue of Agreement, the appellant therein was entrusted with the responsibility and the activity of collecting Airport admission ticket charges on behalf of the Airport Authority India Limited at Karipur Airport, Calicut.

19. We have considered the arguments advanced by the learned counsel for the petitioner, the learned Senior Standing Counsel for the first to third respondents and the learned counsel for the fourth to sixth respondents.

20. By Finance (No.2) Act, 2004, with effect from 10.09.2004, the Parliament introduced the service tax on slew of services which included

levy of service tax on the services provided by the Airport Authority of India or any other person authorized by it within an Airport/Civil Enclave *vide* Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V – Service Tax). The levy came into force with effect from 10.09.2004. It was in the context of Finance (No.2) Act, 2004, Circular No.80/10/2004-ST, dated 17.09.2004 was issued by the Central Board of Excise and Customs.

21. In Paragraph No.5 of Circular No.80/10/2004-ST, dated 17.09.2004, the Central Board of Excise and Customs clarified as under:-

> **5. 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. **<u>However, in case a part of airport/ civil enclave premises is rented/leased out, the</u>**

rental/lease charges would not be subjected to service tax, as the activity of letting out premises is not rendering a service.

22. The above clarification of the Central Board of Excise and Customs *vide* Circular No.80/10/2004-ST dated 17.09.2004 is of no significance as far as this Court is concerned. Circulars of the Boards are not binding on the Court as held by the Hon'ble Supreme Court in the case of **Commissioner of Central Excise, Bolpur** Vs. **M/s Ratan Melting & Wire Industries**, (2004 (6) SCC 722. We therefore refrain from giving a seal of approval of this Court to the above Circular.

23. Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V – Service Tax) was subsequently amended by Finance Act, 2010. It was notified *vide* Notification No.24/2010-ST, dated 22.06.2010 with effect from 01.07.2010. Thus, provision as in force from 10.09.2004 to 30.06.2010 and from 01.07.2010 to 30.06.2012 read slightly different.

24. For a better understanding of the dispute in the present Writ Petition, both the definitions as it stood introduced with effect from 10.09.2004 and as it stood substituted with effect from 01.07.2010 are

reproduced below in a Table:-

As introduced by Finance (No.2) Act, 2004, with effect from 10.09.2004	As substituted by Finance Act, 2010 with effect from 01.07.2010 vide Notification No.24/2010-ST, dated 22.06.2010.
Section 65 Definitions:- (1) ………… ………….. (105) (105) "taxable service" means any service provided or to be provided (a)…….. …………	
(zzm) to any person, by airports authority or any person authorized by its, in an airport or a civil enclave;	(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;

25. A reading of the definition of "taxable service in Section 65(105)(zzm) during the period with effect from 10.09.2004 *prima facie* makes it clear that the fourth respondent was indeed providing a taxable service to the petitioner. Therefore, it was indeed entitled to pass on the incidence of the tax to the petitioner. Section 65A of the Finance Act, 1994 (Chapter V – Service Tax) which has been referred to in *proviso* to

Section 65(105)(zzm) of the Act as amended with effect 01.07.2010 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 (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, in so far 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 merits consideration;

(3) The provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint.

26. Introduction of *proviso* to Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V – Service Tax) with effect from 01.07.2010 stating that the provisions of Section 65A dealing with classification of taxable service shall not apply to any service when the same is rendered wholly or within the Airport or Civil Enclave is not relevant for enquiry in this Writ Petition as in this Writ Petition, we are concerned with definition as it stood during the period between 10.09.2004 and 01.07.2007 prior to introduction of service tax on "Renting of Immovable Property" vide Section 65(105)(zzzz) of the Finance Act, 1994 (Chapter V – Service Tax) with effect from 01.07.2007.

27. In this Writ Petition, we are also not concerned with the amendments brought to the provision of taxable services in Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V – Service Tax) with effect from 01.07.2010.

28. The renting of immovable property which was brought within the purview of service tax net *vide* Finance Act, 2007, with effect from 01.06.2007 introduced the definition of "renting of immovable property"

in Section 65(90a) of the Finance Act, 1994 (Chapter V – Service Tax) to read as under:-

> “65. Definitions:-
> (1)……….
> …………..
> (90a) “renting of immovable property” includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include:
>
> *i. renting of immovable property by a religious body or to a religious body; or*
> *ii. renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre;*
>
> * [Explanation 1] : For the purposes of this clause, “for use in the course or furtherance or business or commerce” includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings;
>
> # [Explanation 2 : For the removal of doubts, it is hereby declared that for the purposes of this clause “renting of immovable property” includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property;].”
>
> *[Vide Finance Act, 2008 (18 of 2008), dated 10.05.2008, w.e.f. 16.05.2008, * Explanation was*

renumbered as Explanation 1 and # Explanation 2 was inserted.]

29. The definition of "taxable service" in Section 65(105)(zzzz) of the Finance Act, 1994 (Chapter V - Service Tax) as it stood introduced by Finance Act, 2007 (22 of 2007), dated 11.05.2007 with effect from 01.06.2007 and as it stood amended by Finance Act, 2010, (14 of 2010) dated 08.05.2010, w.r.e.f. 01.06.2007 vide Noti.No.24/2010-ST dated 22.06.2010 reads as under:-

As introduced by Finance Act, 2007 (22 of 2007), dated 11.05.2007 with effect from 01.06.2007	**As amended by Finance Act, 2010, (14 of 2010) dated 08.05.2010, w.r.e.f. 01.06.2007 vide Noti.No.24/2010-ST dated 22.06.2010.**
Section 65 Definitions:- (1) ………… ………….. (105) (105) "taxable service" means any service provided or to be provided (a)……..	
(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	(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 of 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.

(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; *

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."

** Sub Clause (v) of Explanation 1 was inserted by Finance Act, 2010 (14 of 2010) dated 08.05.2010, w.e.f. 01.07.2010 vide Notification No.24/2010-ST, dated 22.06.2010.*

30. The above *proviso* to Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V – Service Tax) merely clarified that renting of space within Airport was to be continued to be governed by Section

65(105)(zzm) of the Finance Act, 1994 (Chapter V – Service Tax) notwithstanding the introduction of Section 65(105)(zzzz) of the Finance Act, 1994 (Chapter V – Service Tax) to levy tax on renting of immovable property.

31. The function of the *proviso* to Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V – Service Tax) w.e.f. 01.07.2010 *vide* Notification No.24/2010-ST, dated 22.06.2010 was thus limited and was not intended to undo the law as it stood prior to 01.07.2007 or create any new confusion.

32. *Proviso* to Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V – Service Tax) was merely intended to quell confusion, if any, arising out of the orders of various High Courts rendered in the context of the challenge to the provisions relating to renting of immovable property *vide* Section 65(105)(zzzz) of the Finance Act, 1994 (Chapter V – Service Tax) which was brought within the purview of service tax in 2007 w.e.f. 01.06.2007.

33. Therefore, the arguments of the learned counsel for the petitioner that the petitioner cannot be mulcted with service tax liability as the Airport Authority of India is not liable to pay service tax in the light of introduction of service tax on renting of immovable property with effect from 01.07.2007 *vide* Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V – Service Tax) and in the light of Circular No.80/10/2004-ST dated 17.09.2004 cannot be countenanced.

34. Service of renting of immovable property is a separate specie of service. It was brought within the purview of service tax separately vide Section 65(105)(zzzz) with effect from 01.06.2007. *Ipso facto,* it would not mean that any service tax which was payable by the fourth respondent for the service provided by it in any Airport or a Civil Enclave to any person between 10.09.2004 and 31.06.2007 was not taxable.

35. Merely because the service of renting of immovable property was introduced as a separate levy with effect from 01.07.2007 *ipso facto* would not mean that service provided by the Airport Authority of India was not liable to tax w.e.f. 10.09.2004.

36. By this Writ Petition, the petitioner has attempted to pre-empt the fourth, fifth and sixth respondents from passing on the incidence of service tax which was either borne by them or was proposed to be borne by them towards renting of space to them within the Airport or a Civil Enclave. Whether the fourth respondent is/was liable to tax or not is to be determined by the Authorities enforcing the provisions of the Finance Act, 1994.

37. If any proceeding(s) was/were initiated by the statutory Authority, it is open for the fourth respondent to rely upon the above Circular No.80/10/2004-ST, dated 17.09.2004 issued by the Central Board of Excise and Customs before the said Authority as such Circulars are only binding on the Authorities [*see* **Collector of Central Excise, Vadodra** Vs. **Dhiren Chemical Industries**, (2002) 2 SCC 127 : 2001 SCC OnLine SC 1447] though not binding on the Courts as held by the Hon'ble Supreme Court in the case of **M/s Ratan Melting & Wire Industries** referred to *supra*.

38. The present Writ Petition to scuttle any assessment and

adjudication proceedings and proposal to pass on incidence of service tax on the petitioner by the Airport Authority of India namely, the fourth respondent cannot be countenanced.

39. It is preemptory move in an anticipation of steps that would have been taken by the Airport Authority of India by passing on the incidence of service tax in terms of Section 65(105)(zzm) of the Finance Act, 1994 (Chapter V – Service Tax) as it stood with effect from 10.09.2004.

40. Incidentally, the Tribunal in **Airport Authority of India** Vs. **Commissioner of Service Tax, Delhi**, 2015 (39) S.T.R. 35 (Tri. – Del.), has held as under:-

> 22.8. It will be seen that the judgment of Hon'ble Delhi High Court in case of Flemmingo Dutyfree Shops Pvt. Ltd. (supra), judgment of Bombay High Court in case of Sahara Airlines Ltd. V. Union of India (supra) and judgment of Hon'ble Kerala High Court in case of C.E.E. v. Cochin International Airport Pvt. Ltd. (supra) are based either on the Board's Circular No.18/10/04-S.T., dated 17.09.2004 or are based on the concession made by

> the Government counsel based on above mentioned Circular. This Circular of the Board states that no service tax under Section 65(105)(zzm) would be chargeable on the rental/lease charges received by the AAI for rental of part of the premises of an Airport/Civil Enclave, as the activity "letting out premises is not rendering of service". This Circular of the Board stating that letting out of premises is not rendering of service becomes contrary to provisions of law, in view of judgment of Hon'ble Delhi High Court in case Home Solutions Retails (India) Pvt. Ltd. (supra) and, therefore, the judgments or various High Courts which are either based on this Circular of the Board or are based on the concession made by the Government counsels on the basis of the Board's Circular, would not be binding precedents. In view of this, we hold that renting/leasing of space inside the Airports/Civil Enclaves by the appellant to various persons for their business activity is a service and since the same has been provided by AAI inside the Airports/Civil Enclaves, and has nexus with passenger facilitation, it would be covered by Section 65(105)(zzm) and would be taxable.

41. Presently, issue is also covered against the Airport Authority of India in terms of the decision of Delhi Tribunal in **Airport Authority of India** Vs. **Commissioner of Service Tax, Delhi,** 2015 (39) STR 35 (Tri. - Del)) and a S.L.P. has filed against the above Judgment and is said to be pending before the Hon'ble Supreme Court.

42. We are of the *prima facie* view that the above view of the

Tribunal in **Airport Authority of India** Vs. **Commissioner of Service Tax, Delhi**, 2015 (39) S.T.R. 35 (Tri. – Del.) is correct view. Against the above order of the Tribunal, Special Leave Petition has been filed before the Hon'ble Supreme Court and same is said to be pending in **Airports Authority of India** Vs. **Commissioner**, as reported in 2018 (11) G.S.T.L. J138 (S.C.).

43. Therefore, we do not wish to make further observations on merits though we are of the *prima facie* view that the Airport Authority of India was liable to service tax and was entitled to pass on the incidence of the tax on the petitioner.

44. Considering the fact that the issue is pending before the Hon'ble Supreme in S.L.P. filed against the above decision of Delhi Tribunal in **Airport Authority of India** Vs. **Commissioner of Service Tax, Delhi,** 2015 (39) STR 35 (Tri. - Del)), we refrain to give any final view on the subject.

45. If advised, it is also open for the petitioner to approach the Hon'ble Supreme Court in S.L.P. that is pending before the Hon'ble Supreme Court against the above decision of Delhi Tribunal in **Airport Authority of India** Vs. **Commissioner of Service Tax, Delhi,** 2015 (39) STR 35 (Tri. - Del)).

46. In case the above decision of Delhi Tribunal in **Airport Authority of India** Vs. **Commissioner of Service Tax, Delhi,** 2015 (39) STR 35 (Tri. - Del)) is upheld by the Hon'ble Supreme Court, the fourth respondent Airport Authority of India can indeed pass on the incidence of the tax on the petitioner.

47. In case the decision is reversed, it is open for the petitioner to either file a refund claim under Section 11B of the Central Excise Act, 1944 as made applicable to the provisions of the Finance Act, 1994 in terms of Section 83 of the Finance Act, 1994, in accordance with law and law settled by the Hon'ble Supreme Court if the incidence of service tax was passed on it or in the alternative defend such proceedings that may be initiated to recover the amount of service tax from it.

48. We therefore deem it fit to direct the respondents to maintain the *status quo* as on date pending further decision of the Hon'ble Supreme Court in the above S.L.P. filed by the Airport Authority of India.

49. This Writ Petition stands disposed of with the above observations. No cost. Consequently, connected Miscellaneous Petition is closed.

(S.V.N., J.) **(C.S.N., J.)**
16.02.2023

Internet : Yes/No
Index : Yes/No
Jen

To

1.The Secretary,
Department of Revenue,
Ministry of Finance,
Government of India,
North Block, New Delhi – 110 001.

2.The Central Board of Excise and Customs,
Dept. of Revenue,
Ministry of Finance,
Government of India,
North Block, New Delhi – 110 001.

3.The Director General of Service Tax,

9th Floor, Piramal Chambers,
Jijibhoy Lane, Lal Bagh
Parel, Mumbai – 400 012.

4.The Airports Authority of India,
Rajiv Gandhi Bhavan,
Safdarjung Airport, New Delhi.

5.The Director,
Airport Authority of India,
Chennai Airport, Meenambakkam,
Chennai – 600 027.

6.The Deputy General Manager – Commercial
Airport Authority of India
Chennai Airport, Meenambakkam,
Chennai – 600 027.

S.VAIDYANATHAN, J.
and
C.SARAVANAN, J.

Jen

Pre-Delivery Order
made in
W.P.No.34128 of 2007
and M.P.No.1 of 2007

16.02.2023