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JUDGMENT IN COMMISSIONER OF SERVICE TAX VS. MUMBAI INTERNATIONAL AIRPORT PVT LTD

26 May 2023

Introduction

A 2-judge bench of the Supreme Court of India (**SC**) vide its judgment dated 19 May 2023 in the case of Central GST Delhi III vs. Delhi International Airport Ltd, Civil Appeal No. 8996/2019 along with CA No. 2465/2020 and CA Nos. 4751-4753/2021 has held that the Development Fees collected under section 22A of the Airport Authority of India Act, 1994 (**AAI Act**) by Airport Authorities such as Delhi International Airport (**DIAL**), Mumbai International Airport and GMR Hyderabad International Airport (**GHIAL**), shall not be chargeable to Service tax and dismissed the batch of appeals filed by the Service Tax/Central Goods and Service Tax Department and upheld the orders passed by the Customs, Excise and Service Tax Appellate Tribunal (**CESTAT**), West Zonal Bench, Mumbai (in the case of Mumbai International Airport Limited).

Factual Background

- Mumbai International Airport Limited (**MIAL**) entered into an Operation, Management and Development Agreement (**OMDA**) with the Airport Authority of India. Under the OMDA, MIAL had the exclusive right to develop, finance, design, construct, modernize the airport and also to collect and retain appropriate charges from the users of the airport.
- Under a notification dated 27 February 2009 pursuant to section 22A of the AAI Act, MIAL is permitted to collect and retain Development Fee from the embarking passengers from the airport. The said Development Fee is used for the purposes of *inter alia* upgradation, expansion or development of the airport and other stated purposes. The said fee is however not linked to any of the services provided to the passengers from whom the Development Fee is collected.
- Show-cause notices were issued to MIAL for multiple assessment years demanding payment of Service tax on the Development charges collected by MIAL pursuant to section 22A. The demand was confirmed by the Commissioner of Service Tax-1, Mumbai (**CST**), who also imposed penalties as applicable under the Finance Act, 1994.

- The orders-in-original of the CST were challenged before the CESTAT. The CESTAT first remanded the matter to the CST and pursuant thereto, when the demand was again confirmed by the CST, the said demands were challenged again before the CESTAT.
- Vide the impugned order, the CESTAT quashed the demand and *inter alia* held that the amounts collected pursuant to levy under section 22A is significantly different and distinct in its purpose and method of implementation from the charges collected under section 22 of the AAI Act, as confirmed by the Hon'ble Supreme Court in *Consumer Online Foundation & Ors. Vs. Union of India* [(2011) 5 SCC 360]. It was held that the Development Fee charged under section 22A is not towards a corresponding service provided to the passengers by the airport, but is instead towards future upgradation/establishment of the airport.
- The CESTAT also referred to the judgment of the Supreme Court in *Commissioner of Central Excise & Customs, Kochi vs. Cochin International Airport Ltd* [2010 (17) STR 179] to hold that the fee collected under section 22A is towards the user fee and was collected only for enhancement of revenue of the airport, and not for any services rendered to outgoing passengers. The CESTAT further held that the Development Fee is in the nature of cess/tax and therefore, further service tax cannot be levied on the same.
- Aggrieved by the order of the CESTAT and in other similar connected matters, the CST filed a Civil Appeal before the Supreme Court. Other appeals were filed against identical judgments passed in the cases of DIAL and GHIAL.

Issues

- A Whether Service tax was leviable on the Development Fee charged and collected by MIAL under section 22A of the AAI Act?

Judgement

- The Supreme Court dismissed the appeals filed by the CST (along with the connected matters in the cases of DIAL and GHIAL) and *inter alia* held as under:
 - a The Development Fee collected by MIAL is not in consideration of any services provided by MIAL to the embarking passengers upon whom the fee is levied. In absence of any corresponding service, levy of service tax is not attracted on the Development Fee.
 - b The purpose and appropriation of the fee charged under section 22 and the Development Fee collected under section 22A is distinct as held by the Supreme Court in *Consumer Online Foundation*. There is no link between the Development Fee collected and the services provided to the embarking passengers, but instead the said fee is collected towards future upgradation/expansion of the airport. The Supreme Court held that its observations and findings in *Consumer Online Foundation* are decisive about the nature of the Development Fee. In absence of reciprocal service, no service tax can be charged on such fees. In this regard, the Supreme Court referred to its earlier judgment in *Commissioner of Service tax vs. Bhayana Builders (P) Limited 2018 (10) GSTL 118*.

- c As per the judgment in *Consumer Online Foundation*, Development Fee is in the nature of tax collected by the airport authorities pursuant to a prior approval granted by the Central Government, which has to be utilized for statutory purpose as specified in section 22A itself. Therefore, the Supreme Court reiterated, levying service tax on the Development Fee would amount to levy of tax on tax, which has been held to be unconstitutional.
- d The Development Fee is required to be deposited in a separate escrow account which is maintained, controlled and operated under a separate escrow agreement. The ownership of the amounts collected is with the Airport Authority of India and for the said reason too, no service tax can be levied.
- e The circular dated 8 July 2011 of the Central Board of Excise Tax cannot be used to contend that service tax is leviable on Development Fee. In this regard, the Supreme Court reiterated the law settled to the effect that circulars and notifications of revenue departments cannot run contrary to the position of law settled by the Supreme Court.

Comment

In this welcoming judgment, the Supreme Court has reaffirmed the first principles relating to levy of service tax including that no such tax can be levied without there being a corresponding service. The attempt of the department to link the Development Fee with future services was rightly rejected by the Supreme Court as the nexus between the service and the fee must be in *praesenti* and such fee cannot be linked to a later service and be made subject to service tax. The Supreme Court also rightly upheld the force of precedents over circulars and notifications that run contrary to them.

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