CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 4

Service Tax Appeal No. 51677 of 2017

(Arising out of Order-in-Appeal No. 106/ST/Appeal-II/MK/GGM/2017 dated 05.06.2017 passed by the Commissioner of Service Tax (Appeals-II), Haryana)

M/s Airport Retail Private Limited **Appellant**
11, Venus Apartments, Opp. Joggers Park,
Chikuwadi, Boriwali (West), Mumbai

Versus

Commissioner of Service Tax, Gurgaon-II **Respondent**
Central Excise Building, Plot No. 36-37,
Sector 32, Gurgaon-Haryana

Appearance:

Present for the Appellant: Shri Anand Sukumaran, Advocate

Present for the Respondent: Shri S.K. Meena, Authorized Representative

CORAM:
Hon'ble Dr. Rachna Gupta, Member (Judicial)
Hon'ble Ms. Hemambika R. Priya, Member (Technical)

Date of Hearing : 21/05/2025
Date of Decision : 19/08/2025

Final Order No. 51190/2025

Dr. Rachna Gupta:

This appeal has been filed to assail the Order-in-Appeal No. 106/2017 dated 05.06.2017 vide which the refund claim dated 03.07.2015 filed by the appellant for an amount of Rs. 11,73,30,977/- has been rejected under Section 11B of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994.

2. The facts in brief, which culminated into the said order are that the Delhi International Airport (Pvt.) Limited[1] had acquired the Delhi Airport on lease, to operate customs duty free shops in the airport premises under Airport Authority of India agreement dated 04.04.2006. Pursuant to the same DIAL by two agreements dated 9.11.2006 and 07.02.2008 granted the license to run the said duty free shops in the designated areas of Delhi International Airport premises to Airport Retail Pvt. Ltd., the appellant, at a fixed monthly license fee to be paid to the DIAL along with share of gross revenue generated by the various category product which were sold in the duty free shops subject to minimum annual guarantee payment fixed in US Dollars. DIAL started collecting service tax from the appellant.

2.1 The appellant had filed a Writ Petition in the hon'ble High Court of Delhi which was registered as W.P. (C) No. 4274 of 2010 Airport Retail Pvt. Ltd. vs. Union of India & Ors. The hon'ble High Court of Delhi vide its judgment dated 30.07.2014 held that that licence agreement dated 09.11.2006 between DIAL and appellant cannot be subjected to service tax under Section 65 (105) (zzm) of the Finance Act, 1994 for the period prior to 01.07.2010 and in no event could the same be considered as "airport services" under clause (zzm) of Section 65 (105) of the Act. The learned Counsel appearing for the Revenue clarified that the Show Cause Notices issued to DIAL were only limited to taxing the alleged service under Section 65 (105) (zzm) of the Act. DIAL had been collecting service tax for the period April 2007 to November 2008 from

---

1 DIAL

appellant by raising invoices or otherwise. For the period subsequent thereto, the stay has been granted by the hon'ble High Court of Delhi.

2.2 The hon'ble High Court vide the judgment dated 30.07.2014 held that 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, because letting of immovable property was specifically covered under Clause (zzzz) of section 65(105). Section 65A(2) of the Act also mandated 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. The hon'ble High Court vide its order dated 05.09.2014 passed in WP (C) No. 4274 of 2010 had granted liberty to the appellant for filing claim for refund of the service tax. An undertaking was also made on behalf of DIAL that should the claim for refund be made, DIAL would render all assistance.

2.3 Meanwhile two show cause notices were served upon the appellant demanding service tax against the "consideration on account of providing special for augmenting business" demanding service tax for providing airport services in terms of Section 65 (105)(zzm).

(i) Show cause notice dated 22.10.2010 for the period covering 2006-07 to 2009-10

(ii) Show cause notice dated 28.11.2011 on the same ground covering the period from 01.04.2010 to 30.06.2010.

2.4 Though the second show cause notice could have prevailed in line of judgment of hon'ble High Court Delhi for the stand taken and concession made by AG for during the proceedings that the demand for the said period was not sustainable. The demand of the first show cause notice was set aside in the light of Delhi High Court decision. Pursuant thereto, the appellant filed the impugned refund claim on 30th July 2015 along with requisite invoices. However, the claim was rejected initially by the original adjudicating authority vide Order-in-Original No. 18/2016-17 dated 8.12.2016 observing that the appellant had failed to fulfil the legal aspect of the classification. The said finding have been confirmed vide the order under challenge/order in appeal dated 5.6.2017. Being aggrieved, the appellant is before this Tribunal.

3. We have heard Shri Anand Sukumaran, learned counsel for the appellant and Shri S.K. Meena, Authorized Representative for Revenue.

4. Learned counsel for the appellant has submitted that 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 service' under clause (zzm) of Section 65(105) prior to 01.07.2010.

5. Therefore, prior to 01.06.2007, the subject transaction was not taxable under sub-clause (zzm) in view of Circular dated 17.09.2004 which clarified that renting or letting out was not part of airport services. The High Court before noticing the aforesaid clarification, also held that in Home Solutions –I renting of immovable property for use in the course or furtherance of business or commerce could not be regarded as a service, and was not exigible to tax. This order dated 03.11.2009 has not been assailed by the department and has attained finality. By retrospective operation of amended clause 65(105)(zzzz) introduced by the Finance Act, 2010, the subject transaction could be subjected to service tax with effect from 01.06.2007, as taxable service defined under clause 65(105)(zzzz)

6. Further the issue of classification in the case of the appellant is no longer res integra as the High Court had, after carefully analyzing the applicability of the said provisions and their respective dates on which they were brought into force, held that service tax could not be levied from the appellant in view of Section 65A r/w provisions (zzzz) and (zzm) as under:

Prior to 01.06.2007		No service tax could be levied on renting of immovable property in view of circular dated 19.09.2004 and final order passed in 1st WP of the appellant dated 03.11.2009 which has not been assailed by Revenue and has attained finality
1st SCN dated 22.10.2010 issued under (zzm)	2006-07 (w.e.f) 01.06.2007 to 2009-10	(zzzz) is the more appropriate taxing entry after applying Section 65A
2nd SCN dt. 28.09.2011 issued under (zzzz) but was clarified to have been issued under (zzm) before the High Court	April 2010 to June 2010	(zzzz) is the more appropriate taxing entry after applying Section 65A but yet service tax could not be levied in view of the clarified stand of the

		Government treating this SCN as having been issued under (zzm)
	w.e.f 1.07.2010	More appropriate taxing entry, as recourse to Section 65A is excluded

b) Importantly, the Revenue has accepted the above position as laid down in decision of the High Court in the appellant's case and to the best of appellant's knowledge, has not appealed therefrom to the hon'ble Supreme Court, and therefore has attained finality.

7. Learned counsel further submitted that the appellant had filed an application in the High Court seeking direction to the department to refund the amounts paid by the appellant under both the show cause notices which were issued under Section 65 (105)(zzm). The High Court granted liberty to the appellant to move an appropriate application for refund in accordance with law. The present refund application was filed pursuant to that liberty given. Thus the refund claim is wrongly rejected by the adjudicating authority below. Learned counsel also impressed upon that DIAL had collected service tax from the department which stands deposited with the department hence present is not the case of unjust enrichment. With these submissions, the order under challenge is prayed to be set aside and the appeal is prayed to be allowed.

8. While rebutting these submissions, learned Authorized Representative foremost has reiterated the findings of the adjudicating authorities below in addition has placed on record the communication received from the concerned commissionerate vide

Notification No. 29/22/23 dated 20 May 2025. Appeal is prayed to be disposed of accordingly.

9. Having heard both the parties, we observe that the appellant was served with two show cause notices proposing recovery of service tax in terms of Section 65(105)(zzm), the airport services however, it is an apparent from the submission of the appellant which have gone undisputed rather found recorded in the order under challenge that the controversy about the classification of the impugned activity giving licence to the appellant to run the duty free shops in the designated area of Delhi International Airport premises stands at rest by hon'ble High Court Delhi vide their judgement dated 30.7.2014 in the Writ Petition Civil No. 4274/2010 as was filed by the appellant. It has already been held that for the period 2006-07 to 2009-10 the more appropriate tax entry after retrospective amendment in Section 65(105)(zzzz) was 'Renting of Immovable Property'. Hence this service tax could not be collected alleging the activity taxable under 65(105)(zzm), as 'Airport Service' for the period in dispute. The said position stands duly accepted by the Revenue/department also. These observations are sufficient for us to hold that rejecting the refund claim on the ground of failure to fulfil legal aspect of classification is not sustainable.

10. We further observe that in terms of Section 11B of Central Excise Act read with Section 83 of Finance Act, 1994 the refund of duty and interest if any paid on such duty, the claim thereof is permissible subject to two conditions:

(i) the claim should have been raised before one year from the relevant date;

(ii) the incidence of such duty and interest has not been passed on by the claimant to any other persons.

11. We observe that the claim in question for Rs. 11,73,30,977/- was filed pursuant to the judgment of Delhi High Court dated 30.7.2014. As per the definition of relevant date in explanation to said section 11B, sub-clause (e), (c) the relevant date is the date of judgment in case the duty becomes refundable as consequence of judgment or order of appellate authority the order of Delhi High Court giving liberty to the appellant to file the impugned was subsequent to 30 July 2014. The refund claim in question was filed 3 July 2015. Apparently the refund claim is filed within one year of the said relevant date with respect to the issue of passing over the incidence of duty payment, it is the submission of the appellant that DIAL assessment have all been completed and it has been confirmed categorically by DIAL that service tax collected from the appellant has been paid forward by DIAL to the department. Vide their letter dated 4.11.2024 DIAL has confirmed the same specifically mentioning that service tax liability of the appellant for the period up to November 2008 stand already discharged and paid to the department. Learned Departmental Representative has received the copy of the said order from the concerned commissionerate and has placed the same on record while filing the written submissions. It stands clear that there already is positive statement from the alleged service tax provider DIAL which is

sufficient to us that the appellant has not passed on the burden of such duty paid.

12. With these observations, it is held that both the requisite conditions of sanctioning a refund claim in terms of Section 11B of Central excise Act stands fulfilled by the appellant. The refund claim was otherwise filed pursuant to liberty given by the hon'ble High Court, Delhi who ordered for no liability of the appellant on the impugned activity for the period in dispute. Resultantly, we hold that rejection of refund that too on the bais of raising the issue of classification is against the principles of judicial protocol. The order is accordingly, set aside. Consequent thereto, the appeal is hereby allowed.

(Pronounced in open Court on 19.08.2025)

(Dr. Rachna Gupta)
Member (Judicial)

(Hemambika R. Priya)
Member (Technical)

RM