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

+ W.P.(C) 10757/2006

M/S FLEMINGO DUTY SHOPS PVT. LTD. Petitioner
Through: None.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Sparsh Bhargava & Mr. Tarun
Gulati, Advs. for R-3/DIAL.
Mr. Aayush Saxena, Adv. for Mr.
Sanjeev Kumar Dubey, Adv.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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05.10.2012

1. None has appeared for the petitioner. The petition being of the year 2006, it is not deemed expedient to await the appellant any further. We have, with the assistance of the counsels appearing for the respondents gone through the records.

2. This petition was filed seeking a declaration, that the purported levy of service tax on lease rental including royalties payable by the petitioner to the respondent no.2 Airports Authority of India (AAI) for space rented/licensed in the airport premises for housing of the duty free shop, as *ultra vires* the Constitution; the respondents were also sought to be restrained from demanding and/or levying service tax on licence fee paid by the petitioner to the respondent no.2 AAI for space licensed/leased in the

various airports.

3. Notice of the petition was issued and in the order dated 10th July, 2006 it was noted that the petitioner had already paid service tax under protest amounting to Rs.39,41,500/- for the period from September, 2004 to March, 2006; however further recovery of service tax from the petitioner was stayed, though demand permitted to be raised by the respondents on the petitioner. Vide subsequent order dated 25th November, 2011, Delhi International Airport Pvt. Ltd. (DIAL) was impleaded as a respondent. The interim order aforesaid was continued from time to time and was made absolute on 27th March, 2012.

4. The counsel for the respondent no.3 DIAL has contended that the facts of the present petition are similar to those of W.P.(C) No.4653/2011, 7625/2011, 8254/2011, 8258/2011, 469/2012, 7144/2011 & 7145/2011 allowed by this Court vide order dated 17th July, 2012.

5. We have perused the said order. In those cases also, AAI had let out/given on licence or lease certain premises to the petitioners therein for the purpose of running a counter or for parking and the Service Tax Department, invoking Section 65 (105) (zzm) of the Finance Act, 1994 was claiming service tax on the rental/licence fee which was being paid by the petitioners therein to the AAI. It was the contention of the petitioners therein that Section 65 (105) (zzm) does not entail renting out of immovable property and the same does not constitute a taxable service and is not exigible to service tax. Reliance was placed on clarification issued by Central Board of Custom and Excise vide Circular No.80/10/2004-S.T.,

dated 17.9.2004.

6. This Court, in the order dated 17th July, 2012, on the basis of the said circular had held that in so far as letting out of the part of Airport services is concerned, no service tax is payable as per the said circular and accordingly the demand for service tax was quashed.

7. However the period in question in all those cases was prior to 1st June, 2007.

8. Thus, the benefit of the aforesaid order dated 17th July, 2012 would be available to the petitioner herein only for the period prior to 1st June, 2007 and following the said order the demand for service tax in the present case also, till the period prior to 1st June, 2007 is quashed.

9. However as far as the relief claimed for the period after 1st June, 2007 is concerned, we find that several other similar matters being W.P.(C) No.15095/2006, 15096/2006, 532/2007, 545/2007, 546/2007, 1296/2007, 4655/2011, 8261/2011, 8262/2011, 8263/2011 & 8264/2011 had come up before a Division Bench of this Court on 12th April, 2012, each of the petitioners wherein also had entered into an agreement with the AAI and which petitions also were challenging the levy of service tax. Finding that the stand of the AAI also was that no service tax was payable and that AAI had demanded service tax from the petitioners therein merely because the Service Tax Authorities had demanded the same from AAI and further finding that the challenge was to the applicability of the service tax rather than the *vires* of the statutory provision and that the appeal of AAI itself against the order of the Commissioner, Service Tax holding AAI liable for

payment of service tax was pending consideration, the said petitions were disposed of by allowing the petitioners therein to join the appeal proceedings and granting them an opportunity of hearing in the said appeal proceedings against the assessment order. As far as the dispute *inter se* between those petitioners and AAI as to who is to be liable for service tax, in the event of it being ultimately held that service tax is payable, it was found that the agreement of each of those petitioners with the AAI contained an arbitration clause. Those petitions were accordingly disposed of, further making an interim arrangement permitting AAI, to in cases where the agreements have come to an end, to continue the security held by it and granting liberty to seek remedies with respect thereto in the arbitration proceedings if ultimately to be held; it was further directed that wherever service tax had been paid, in the event of it being held that the service tax was not leviable, amounts collected towards service tax shall be refunded by AAI to the petitioners. Wherever sufficient security was not being held by AAI, direction was issued for filing an affidavit of undertaking to this Court to pay the service tax if ultimately found due.

10. We accordingly dispose of the present petition in so far as for the period after 1st June, 2007 is concerned, in accordance with the order dated 12th April, 2012 supra. Accordingly, the respondent no.2 AAI is directed to intimate to the petitioner the next date of hearing in the appeal and the petitioner is permitted to participate in the said appeal proceeding. In the event of it being ultimately found that service tax is payable for the period from 1st June, 2007 onwards, the *inter se* dispute shall be resolved by arbitration. The amount of Rs. 39,41,500/- already paid by the petitioner

shall remain with the respondent no.2 AAI for the time being and the petitioner to, within one month herefrom file an affidavit of undertaking to pay the additional liability if any ultimately found due towards service tax to the respondent no.2 AAI.

The petition is disposed of.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

OCTOBER 05, 2012

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