
**(2014) 267 CTR 327 : (2014) 44 GST 234 : (2014) 26 GSTR 202 : (2014) 34 STR 21 :
(2014) 71 VST 215**

Delhi High Court

Case No: CEAC 1 and 2 of 2014, C.M. Application 639 of 2014

Mahesh Sunny
Enterprises Pvt. Ltd.

APPELLANT

Vs

Commissioner, Service
Tax Commissionerate,
New Delhi

RESPONDENT

Date of Decision: Feb. 17, 2014

Acts Referred:

Finance Act, 1994 - Section 65 65(105) 65(105)(zzm) 65(105)(zzm) 65(105)(zzzz)

Citation: (2014) 267 CTR 327 : (2014) 44 GST 234 : (2014) 26 GSTR 202 : (2014) 34 STR 21 :
(2014) 71 VST 215

Hon'ble Judges: S. Ravindra Bhat, J; R.V. Easwar, J

Bench: Division Bench

Advocate: J.K. Mittal and Sh. Varun Gaba, for the Appellant; Satish Kumar, Senior Standing
Counsel, for the Respondent

Judgement

S. Ravindra Bhat, J.

The following question of law arises for consideration in these two appeals; they were
formulated on 15th January,

2014:

CEAC No. 1/2014:

(1) Is the appellant liable to pay service tax for the car parking business and its
management?

(2) If so, with effect from what period?

CEAC No. 2/2014:

Did the Tribunal fall into error in directing the appellant to pay penalty in the facts and circumstances of the case?

The appellant is aggrieved by an order of the Customs, Excise and Service Tax Appellate Tribunal, dated 21.08.2013. That order disposed off its

appeal, and at the same time, allowed the revenue's appeal (the latter, against the order refusing to impose penalty).

2. Brief facts of the case are that appellant was engaged in the management of cars/scooter parking facilities at Indira Gandhi International Airport,

New Delhi. This was through an agreement dated 07.11.2003 with Airports Authority of India (AAI) for management of computerized car parking

facilities at various locations of International Cargo Complex, IGI Airport, New Delhi and the other agreement dated 01.06.2004 for management

of car parking facilities at Jaipur. The activities, according to the Service tax authorities, were taxable services with effect from 10.09.2004. The

respondents investigated into the issue, and became aware of the two agreements. It alleged that providing the car parking facility is covered under

Airport Service as defined u/s 65(105)(zzm) of the Finance Act, and accordingly Show Cause Notice was issued on 24.12.2007 by

Commissioner Service Tax, Delhi demanding the Service Tax amounting to Rs. 1,93,55,142/- alongwith interest and also proposing penalties u/s

76, 77 and 78 of the Finance Act. The said Show Cause Notice was confirmed by the Commissioner vide impugned order under which he

confirmed the Service Tax amount of Rs. 1,93,55,142/- along with interest against the appellant/assessee. However, the Commissioner did not

impose any penalty u/s 76, 77 and 78 of the Finance Act, on the assessee. The assessee has challenged the impugned order in the present appeal

against the confirmation of demand of Service Tax along with interest on them and Revenue has challenged the impugned order for non-imposition

of penalties by the Commissioner u/s 76, 77 and 78 of the Finance Act.

3. The Tribunal, in view of the submissions made by the parties, was of the opinion that no fault could be found with the approach of the service

tax authorities; it upheld the demand and confirmed it. The revenue's appeal, was however, allowed, since the Tribunal was of the opinion that the

appellant did not file service tax returns and pay the tax liabilities, and, therefore, indulged in wilful suppression of material facts. Accordingly the

Tribunal directed imposition of penalty.

4. The Tribunal's impugned order is questioned by the assessee on the ground that its tax liability is untenable. It was submitted that in view of the

decision reported as M/s Fleming Duty Shops Pvt. Ltd. Vs. Union of India and Others, parking cannot be considered as a taxable service, within

Section 65 of the Finance Act, 1994. It was urged that the introduction of Section 65 (98a) read with Explanation 1 (c) to Section 65 (105)(zzzz)

with effect from 01.06.2007 clarified doubts if any, that parking was not a taxable service at all. Counsel stressed that the expansive definition of

immovable property"" spells out clear legislative intent that even parking activity would fall within the expression ""license"" u/s 65 (98a), yet the

introduction of Section 65 (105) (zzzz), Explanation 1 (c) made it clear beyond doubt that parking was never seen to be a taxable service.

5. Arguing for the revenue, Shri Satish Kumar, relied on Section 65 (zzm) and stated that this provision, (in respect of ""airport services"") was

brought into force with effect from 10.09.2004. At that time, Section 65 (105) (zzzz) was not in the statute book. By introduction of the latter, all

that was done was to bring within the tax net, ""renting of immovable property"". However, parking in airports, like licensing kiosks, terminal-to-

terminal transfers, airport admission ticketing, etc. clearly fell within the sweep of ""airport service"" as to be taxable. Besides, argued the counsel,

the assessee did not dispute the tax liability in this case; it merely contended that there venue could not have invoked the extended period of

limitation u/s 73, since, according to it, there was no wilful suppression of fact.

Applicable law

6. Section 65 (105) was amended with effect from 10.09.2004. It inter alia, included, in the description of ""taxable services"", airport services, by

introduction of clause (zzm), which read as follows:

(zzm) to any person, by airports authority or by any other person, in any airport or a civil enclave:

7. The amendment made with effect from 01.06.2007, introduced ""renting immovable properties"" as a taxable service, by including clause (zzzz)-to

Section 65 (105). As to what is renting of immovable property was defined in Section 65 (90a), which read as follows:

Section 65

...(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 of 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.

8. Section 65 (105) (zzzz) of the Finance Act, 1994, introduced with effect from 01.06.2007, reads as follows:

(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 or 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,
- (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;

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. 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.

9. After the above amendment, in 2010, a proviso was added to Section 65 (105) (zzm); it reads as follows:

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;

10. In Flemingo (supra), the Court dealt with the same issue, i.e. taxability of certain services provided in airport prior to 01.06.2007 in the context

of the revenue"s contention that ""airport service"" was taxable, by virtue of Section 65 (105) (zzm) with effect from 10.09.2004. Repelling the

revenue"s contention, the Division Bench held that the services prior to 2007 were not taxable, and observed as follows:

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.

11. The circular alluded to, No. 80/10/2004 dated 10.09.2004, to the extent it is relevant, stated that:

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. However, in case a part of airport/civil enclave premises is rented/leased out, the

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

12. The common order in W.P.(C) No. 4653/2011, 7625/2011, 8254/2011, 8258/2011, 469/2012, 7144/2011 & 7145/2011 allowed by this

Court by order dated 17th July, 2012 also referred to parking, as in the present case. Consequently, by authority of precedent, this Court holds

that parking in airports was not a taxable service at the relevant time, i.e. 10.09.2004 to 01.06.2007.

13. This Court is further of the opinion that the revenue's attempt to tax parking for the concerned period cannot succeed, for the following

reasons. Renting immovable became a taxable service, with effect from 01.06.2007, with introduction of Section 65 (105) (zzzz). The seemingly

wide import of the expression ""renting"" which includes licensing, and other arrangements that do not create any interest in the property, is apparent

from a reading of the definition of ""renting of immovable property"". Matters however, did not rest there; Parliament clarified-by Explanation (1) (v)

(c) to Section 65 (105) (zzzz) that parking is not a taxable services, and excluded from it (by stating that such activity would not be included). That

Explanation reads as follows:

(c) land used for educational, sports, circus, entertainment and parking purposes..

14. The above provision, i.e. the Explanation makes it clear beyond any doubt, that Parliament had intended that renting or immovable property

was to be taxed, for the first time, from 1st June, 2007. Its intention that parking was to fall within the expression ""renting of immovable property""-

again with effect from 01.06.2007, is also clear from Section 65 (90a). Yet, the definition of taxable service, while introducing Section 65 (105)

(zzzz) specifically excluded parking services. Now, parking services-regardless of wherever it is carried on-stand excluded in entirety. Therefore, it

is not open now for the revenue to argue that it falls within the expression ""airport service"" u/s 65 (105) (zzm). Parliament would have manifested

its intention to bring to tax a part of the activity, carried out in airport premises, if it wished, in more express and clearer terms. For these reasons,

this Court is in agreement with the reasoning in Flemingo (supra) and the previous orders it relied on.

15. So far as the revenue's argument that the issue cannot be gone into, because the assessee did not dispute the basic liability is concerned, this

Court is of the opinion that a concession, if made on an erroneous understanding of the law; at any rate without the sanction of law to collect the

amounts demanded, the revenue cannot rely upon the technicality of a concession of law. In view of the above discussion, the appeals are entitled

to be allowed. The demands and penalty imposed upon the assessee-Petitioner through the impugned order and the Commissioner's orders are

hereby set aside. The appeals are allowed.