

SUPREME COURT OF INDIA

Delhi International Airport Pvt. Ltd.

Vs.

UOI

(Anil R. Dave and Uday Umesh Lalit JJ.)

04.12.2014

ORDER

UDAY U. LALIT, J.

1. Leave granted. This appeal seeks to challenge the order dated 30.07.2014 passed by the High Court of Delhi in Writ Petition No.4274 of 2010 to the extent it directed the appellant to bear the cost for the bank guarantee furnished by the present Respondent No.5.

2. The appellant and the Airport Authority of India entered into an Operation, Management and Development Agreement ("OMDA" for short) dated 04.04.2006 whereby the appellant, undertook inter alia, to perform the functions of the operation, management, development and design, upgradation, modernization, finance and management of the Indira Gandhi International Airport at Delhi and to perform Aeronautical Services and Non- Aeronautical Services. The appellant was given on lease the premises of the Airport for performing the obligations as mentioned in the OMDA. In pursuance of its business and operation at the Airport, the appellant entered into an agreement dated 09.11.2006 whereby licensees named therein were granted a licence to set up and operate duty free shops within the airport premises. Thereafter Respondent No.5 herein was incorporated and a settlement agreement dated 07.02.2008 was signed whereby licence agreement dated 09.11.2006 was novated in favour of Respondent No.5. In consideration of said licence, Respondent No.5 was required to pay to the appellant a fixed monthly licence fee and also a share of the gross revenue generated by various products categories which were to be sold at

the duty free shops.

3. The Finance Act, 2007 introduced the levy of service tax on services in relation to renting of immovable property through the introduction of Section 65(90)(a). The charge of service tax was accordingly introduced in Section 65(105)(zzzz). Thereafter section 65 (105)(zzm) of the Finance Act, 1994 was amended with effect from 01.07.2010 and section 65 (105) (zzzz) of the Finance Act, 1994 was also amended with retrospective effect from 01.06.2007. In view of the amended clause 65 (105) (zzzz), service tax was levied retrospectively from 01.06.2007 on renting of the immovable property. In view of such retrospective amendment the appellant called upon Respondent no.5 to send the entire amount of service tax w.e.f. 01.06.2007, which led to the filing of W.P. No.4274 of 2010 by respondent no.5 in the High Court of Delhi. The High Court by its order dated 23.06.2010 extended the interim order passed in similar matter in favour of respondent no.5 to the effect, "In the meanwhile there shall be no recovery of service tax from the petitioner in respect of renting of immovable property alone." During the pendency of said petition, the appellant again vide its letter dated 28.06.2010 demanded payment of service tax from respondent no.5.

4. Thereafter the revenue issued a demand-cum-show cause notice dated 22.10.2010 to the appellant demanding service tax for the period covering 2006-2007 to 2009-2010. While these demands were raised, the appellant asserted that the liability was that of respondent no.5. Around this time the disputes between the appellant, respondent no.5 and the holding company of respondent no.5 were settled and an arbitration award was passed with consent on 30.03.2011 which recorded that the service tax, interest and penalty, if any, on the transaction between the appellant and respondent no.5 was liable to be paid by respondent no.5 in terms of said award. The relevant portion of the Consent Award was to the following effect: "(iii) Respondent shall pay to the Claimant, the entire actual amount towards - (a) Service Tax (b) Interest on Service Tax, and (c) Penalty on Service Tax as may be imposed by the Government and /or relevant authority in relation to the invoices raised by DIAL on Alpha Airport Retail Private Limited under the Agreement within 7 days of such imposition. As the actual amount towards (a), (b) and (c) (together referred to as 'Tax Liability') cannot be ascertained as of now, in view of the litigation pending (i.e. under Civil Writ Petition No.4274 of 2010) before the High Court of Delhi, the amount calculated towards the Tax Liability is the aggregate of :-

(a) an amount of INR 177,424,866 (Indian rupees one Hundred and Seventy-Seven Million Four Hundred and Twenty Four Thousand Eight Hundred and Sixty Six only) towards Service Tax chargeable and payable to the Government of India, which may be increased or decreased as per the assessment or demand made by the Service Tax Authorities.

(b) an amount payable towards the interest on Service Tax, calculated in accordance with the applicable Service Tax rules;

(c) an amount payable towards penalty, if any, imposed on non-payment of Service Tax calculated in accordance with the applicable Service Tax rules. The Respondent shall make payment of the amount due towards the Tax Liability within 7 (seven) days of receipt of demand from the Claimant in this regard."

5. After the aforesaid interim order dated 23.06.2010 was confirmed till the disposal of the writ petition, the appellant preferred CM No.7343 of 2012 for modification of the order dated 23.06.2010 seeking following reliefs:

"a. Modify the interim order dated 23.06.2010 and pass an order directing the Petitioner to deposit the amount payable towards Service Tax, interest and penalty before this Hon'ble Court or to furnish a bank guarantee in favour of the Applicant, Delhi International Airport Ltd, or the Union of India of an amount of Rs.42,36,52,066/- comprising of Rs.17,74,24,866 as service tax payable and Rs.6,88,02,334/ as interest till date and Rs.17,74,24,866 towards penalty and to continue to deposit periodically before this Hon'ble Court amounts towards interest accruing on the that service tax, till the disposal of the petition or periodically increase bank guarantee in favour of the Applicant in respect of the said amounts;

b. For such further and other orders, directions and reliefs as the nature and circumstances of the case may require."

6. The aforesaid application was disposed of by the High Court directing Respondent No.5 to furnish the bank guarantee in the sum of Rs.42,36,52,066/- in favour of the Registrar General of the High Court for securing the amount as none of the Directors

of Respondent No.5 was within the jurisdiction of the High Court and as Respondent No.5 had no assets in this country. Respondent No.5, however, filed CM No.2222 of 2013 seeking modification of the aforesaid order dated 05.11.2012. On the said application, the High Court was pleased to direct Respondent No.5 to furnish a bank guarantee of Rs.25 crores in favour of the Registrar General of the High Court as an interim measure and the said order was later confirmed on 10.04.2013. It was the contention of Respondent No.5 that the insistence on the part of the appellant that Respondent No.5 must deposit the tax or furnish the bank guarantee was contrary to the terms of the Arbitration Award and thus the costs in respect of such bank guarantee which were to the tune of Rs.1.06 crores were liable to be paid by the appellant. The High Court left this question to be decided along with the main writ petition.

7. The aforesaid writ petition No.4274 of 2010 preferred by Respondent No.5 was finally heard by the High Court which held that the transaction between the appellant and Respondent No.5 regarding letting out of immovable property would not fall within the taxable service of "airport services" under clause (zzz) of Section 65(105) prior to 01.07.2010. As regards the liability to pay the costs for obtaining the bank guarantee furnished by Respondent No.5 it observed that the appellant was fully aware and had consented to the arrangements as recorded in the award dated 30.03.2011 and as such it was not open for the appellant to seek that Respondent No.5 deposit the entire amount of service tax as the same was contrary to the consent award dated 30.03.2011. It was further observed that despite having such Consent Award in its favour, the appellant insisted on Respondent No.5 securing it by a bank guarantee and as such it is the appellant who must bear the cost for the bank guarantee furnished by Respondent No.5. The High Court thus directed the appellant to pay to Respondent No.5 a sum of Rs.1.06 crores, being the cost of bank guarantee.

8. It is this direction that the appellant must pay to Respondent No.5 the cost of bank guarantee, which is under challenge in the present appeal. We have heard Shri S.K. Bagaria, learned Senior Advocate for the appellant and Mr. S. Ganesh, learned Senior Advocate for Respondent No.5. Having gone through the matter and considered the rival submissions we affirm the view taken by the High Court. The interest of the appellant was well secured by the Award dated 30.03.2011 which was a Consent Award. Respondent No.5 had an interim order in its favour passed by the High Court and it was only because of the insistence on part of appellant that Respondent No.5

was directed to furnish the bank guarantee. It is, therefore, but logical and consequential that the appellant must bear the costs for securing such bank guarantee. Confirming the view taken by the High Court we dismiss the present appeal. However, there will be no order as to costs.