TELEGRAM : CEGCANAL
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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. ST/28 & 659/2007 - CU[DB]   Date **27/06/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S OBEROI FLIGHT SERVICES(A UNIT OF EIH LTD)
TERMINAL I A, IGI AIRPORT, N. DELHI.

M/S OBEROI FLIGHT SERVICES(A UNIT OF EIH LTD) Appellant

Vs

C.S.T.DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No.ST/239-240 2011 CU[DB]** dated 22.06.11 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.S.T.DELHI
IAEA HOUSE, 17-B, M.G. MARG,
I.P. ESTATE, N. DELHI.

2. Adv. / Consult
MR.V.LAKSHMI KUMARAN
B-6/10, SAFDARJUNG ENCLAVE, NEW DELHI-110029

3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. M/s I.T.C. Welcome Group Port Lounge Terminal 1A I.G.I. Airport New Delhi

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No. 2, R.K. Puram,
NEW DELHI

COURT No. III

Service Tax Appeal No. 28 of 2007 and
Service Tax Appeal No.659 of 2007 (DB)

Date of hearing/~~decision~~: 11th May, 2011
Pronounced on 22.06.2011

[Arising out of the Order-In-Original No.40/2006, dated 27.10.06 passed by The Commissioner of Service Tax, New Delhi]

For Approval and signature :
Hon'ble Shri M.V.Ravindran, Judicial Member
Hon'ble Shri M.Veeraiyan, Technical Member

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	No
3.	Whether their Lordships wish to see the fair copy of the order?	:	Seen
4.	Whether order is to be circulated to the Department Authorities?	:	Yes

I. M/s Oberoi Flight Services — Appellant

Versus

CST, Delhi — Respondent

II. CST, Delhi — Appellant

Versus

ITC Welcome Group — Respondent

Appearance
Shri Amrish Jain, Departmental Representative – for the respondent
Shri A.R.Madhav Rao, Advocate, Shri Udayaditya Banerji, Advocate and Shri Anil Sood, Advocate – for the appellant
Shri B.L.Soni, DR – for the respondent assessee

CORAM : **Hon'ble M.V.Ravindran, Judicial Member**
Hon'ble Shri M.Veeraiyan, Technical Member

Final Order No. ST/239-240/11 Dated : 22.6.11

Per : M.V.Ravindran

Both these appeals are filed against Order-In-Original No.40/2006, dated 27.10.06. In Appeal No.659/07, Revenue is aggrieved by the Order-In-Original, which has dropped proceedings initiated by the Show Cause Notice while in Appeal No.28/2007, assessee is in appeal against the confirmation of the service tax demand along with interest by the adjudicating authority and consequent penalty thereof. Since the issues involved in both appeals are identical, they are being disposed off by a common order.

2. Relevant facts that arise for consideration in both the appeals are the assessees herein were operating a lounge at Indira Gandhi International Airport, New Delhi. It appeared to revenue authorities that the services rendered by the assessee in the said lounge as regarding providing food, drinks, giving amenities, facilities to the passengers at airport like space to sit & relax and watch TV, read newspapers & magazines, providing of liquor, computer with internet facilities etc. will be services rendered which would be covered under the category of "Airport services" as provided u/s 65(105)(zzm) of the Finance Act, 1944. Coming to such a conclusion, Show Cause Notice was issued to the assessees. Assessees contested the Show Cause Notice on various grounds before the adjudicating authorities. In case of Oberoi Flight Services in Appeal No.28/07, that the adjudicating authority did not accept the contention raised by the assessee and confirmed the demand along with interest and imposed consequent penalties. In respect of ITDC Welcome Group in Appeal No.659/2007, the adjudicating authority held that the services

rendered by the assessee would not fall under the category of "Airport services". Coming to such a conclusion, he dropped the proceedings.

3. Ld. Counsel on behalf of assessee in the case of M/s Oberoi Flight Services would submit that that as assessee are selling food and beverages in the lounge, the appellants are not rendering any service, supply of food and beverages by the appellant in the lounge and sale of goods are subject to sales tax hence not liable to service tax. In this regard, he would draw our attention on the various provisions of Airport Authorities Act, and also to the returns filed with Delhi Sales Tax authorities, i.e., Delhi Value Added Tax Act. It is submission that the judgement of the Apex Court in the case of State of Punjab vs. Associated Hotels Ltd. [(1972)1SCC472] would apply wherein the Apex Court decided whether the hotel was liable to pay service tax on the meals served in the hotel where the bill tendered to the guest was an all inclusive one, i.e., a fixed amount for the stay in the hotel for each day and for food. It is his submission that the Apex Court held that the primary function is to serve meals desired by a customer, although along with the food, the customer gets certain other amenities also such as service, linen etc. It is his submission that the Ld. Commissioner has not correctly appreciated the law decided by the Apex Court.

3.1. It is his submission that aspect theory as is sought to be apply in this case is incorrect. The Apex Court while upholding the principle contained in 'aspect theory' stated that the doctrine merely deals with the legislative competence which is undoubtedly a well settled principle.

3.2. It is his submission that analysis of Entry 54 under List II and 92-C under List I contained in Schedule VII of the Constitution of India shows that the Centre does not have competence to levy service tax on these deemed sales and it is his submission that in this case deemed sale as supply of food is a part of service or by way of service and thus forms part of an integrated set of activities.

3.3. It is his submission that operation and maintenance of the 'clipper lounge' at the airport terminal is not an airport authority service.

3.4. He would draw our attention to the definition of taxable service on said services w.e.f. 10.09.2004 and submit that in order to be covered under 'airport services', the ingredients which are required are :-

(a) service must be provided by the Airport Authority of India (AAI) or any person authorised by it;

(b) Airport authority also includes a person having charge of management of an airport or civil enclave;

(c) service can be provided to any person; and

(d) service must be provided in an airport or civil enclave.

3.5. It is his further submission that vide Circular No.80/10/2004-ST, dated 17.09.2004, the services which were liable to be taxed under the issue services were cargo and passenger handling such as security, transit facilities, landing charges, terminal navigation charges, parking and housing charges and route navigation facility charges. It is his submission that these services will be taxable under 'airport service' even when they are provided by other persons who are authorised by AAI. It is his submission that as per Section 12 of AAI Act, the AAI have to discharge the functions indicated therein while establishing, maintenance of hotels, restaurants, are facilities which are not statutory functions but providing amenities. It is his submission that functions of the AAI may be broadly classified into two categories viz. services (or provision of amenities) and regulatory functions. In the case of regulatory functions, the AAI cannot be said to be rendering a service. AAI merely permits another person to undertake certain activities within the airport. It is his submission that the appellant have been granted a licence by AAI to operate the 'clipper lounge' at the International Terminal of Delhi Airport. Operation and maintenance of executive lounge is not a service, either supposed to be provided or provided by the AAI. It is his submission that the activities undertaken by assessee by operating and maintaining the lounge are not covered by the 'airport service'. It is also his submission that AAI has leased out the area to assessees. He would draw our attention to the regulations of Airport Authority of India Act.

3.6. It is his alternative submission that the value of goods and material sold should be excluded from Service Tax liability collected by the authorities. It is his submission that in the present case, the assessee is completely paying VAT on the entire consideration received by them from the airlines, hence there is no question of discharging services tax liability. It is his submission that the amount charged for passengers from the airlines is only towards food and beverages supplied at the lounge and no extra charges from the airlines. In the absence of further amount charged towards services, question of discharging services tax liability does not arise.

3.7. As another alternative submission, it is stated that the AAI does not lay down that the assessee has to expressly avail the option. In fact, it is reiterated that the courts have held in the favour of the assessee even in the absence of provisions. In addition the trade notice also supports the contention which is based on the principle which finds reflection in the specific amendment encapsulated in section 67 of the Act. It is his submission that there is no estoppel in tax law as even though the assessee has got registered under 'Airport Services' and started filing returns. It is his submission that the Show Cause Notice which [redacted] sought to invoke the extended period of limitation on the ground is incorrect. The appellant has not been discharging Service Tax solely on account of their bonafide belief that the transaction in question did not attract service tax as it was a sale.

4.1. Ld. DR arguing on the points made by the Ld. Counsel in Oberoi Flight Services case would submit that the Commissioner has come to the correct conclusion that the company was providing services under category of 'airport services'. It is his submission that as per the agreement AAI authorised the assessee companies to extend the lounge service facilities to various airlines. These lounge services have been provided by the person authorised by the AAI under the agreement. It is his submission that the Board's Circular dated 17.09.04 would subsequently apply, as in this case, if AAI was providing such lounge facility to the passengers and charging the same from different airlines, services tax liability would get attracted. It is his submission that the assertion made the Ld. Counsel that assessee was not authorised by the AAI could not be accepted as the services which are rendered by the assessees are actually services to be rendered by the AAI. It is his submission that the assessees in these appeals provide various services to the higher class passengers of the airlines which would have been provided by the AAI for the convenience of the passengers. It is his submission that the main task of the assessees is not to do the business of sale of food, beverages, drinks, snacks but render service to the exclusive class, for which assessee charges fixed price on the basis of number of passengers who decide to avail lounge facilities. Therefore, the activities undertaken by the appellants by operating and maintaining the lounge are covered by the 'airport service'. It is his submission that such exclusive facilities are reserved for specific class of passengers, standards in the lounge that needs to be maintained are of very high standards. It is his submission that the fact that the determinative nature of business of the company is providing service to exclusive class of passengers, hence, therefore, literal interpretation would be unjust and not in keeping with the spirit and intention of the taxable service in question. It is the submission that contention is supported by the CBEC Circular No.80/10/2004-ST, that has correctly identified the scope of the service and restricted it to services coming within the scope of management of an airport. It is his submission that what is contemplated under section 65(105)(zzm) of the Act is any person 'authorised' by the AAI and therefore for a person /body/company etc. to fall within the ambit of this taxable service the person so authorized is necessarily acting as an agent of the AAI. It is his submission that the services provided by the appellant to the passengers were as per agreement with the airlines.

4.2. At the conclusion of the hearing on 11.05.2011, both sides sought and were permitted to file further written submissions. Both sides filed further written submissions and the same is considered for arriving at conclusion.

5. We have considered the submissions made in length by both sides and perused the records.

6. The undisputed facts in this case are assessees were running an establishment in the name of lounge within premises of Indira Gandhi International Airport, Delhi. The assessees are charging the airlines the amount for the snacks/drinks/lounge facilities offered by them to passengers of these airlines. The assessees are situated in the premises of airport wherein Airport Authority of India has got powers to permit the functioning of such lounge.

7. That the assessees were raising invoices/bills on the airlines for the supply and sale of snacks/drinks which indicated discharge of applicable sales tax/VAT by them.

8. In the factual matrix as indicated above, it is to be seen whether the services rendered by the appellant would get covered under "Airport Services" as held by adjudicating authority, falling under section 65(105)(zzm) under taxable service, "Any person of airport authorized or any person authorized by it in any airport or civic enclave" or otherwise.

9. On perusal of agreement entered by the assessee with the AAI which is enclosed in the Appeal of M/s Oberoi Flight Services case, it is seen that the said agreement, discusses about parting of a specified area to assessees for establishing a lounge on payment of specified amount as a licence fee, by the assessee to the AAI for a specific period. The said agreement also includes clauses to the effect that the AAI shall provide only bare area within the airport premises and assessees are required to organize for provision of lounge and other expenses for establishment of such lounges shall be incurred by the assessee who is treated as a licencee. It is also seen from the said agreement, the assessee shall use the premises for the purpose of supply and sale of snacks/drinks etc. for use of all passengers and bonafide visitors to the airport and officers of the authority. It is also seen from the agreement that from the entire terms of agreement, they are indicative of and agreement for an area/space given on lease for running a business of catering to special needs. In pursuance to such an agreement, the assessee herein provided and established lounge facilities of a kind of hotel or eatery for the passengers or visitors. It is also seen from the records, the appellant herein were not only providing the services of snacks/drinks to the exclusive class of passengers, but also to any person who visited the said

lounge and was ready to pay the consideration. It can be seen from the record and bills and invoices raised by the appellant on various airlines that the assessee has been billing airlines for the food/drinks and that they are discharging VAT at the applicable rate.

10. We have perused one of the order of the assessees entered with the airlines. It is seen that the said order clearly indicates that assesses herein were rendering the facility to the bonafide passengers of the airlines who produce lounge cards. In our view the airlines were offering the services to their customers through the assessees. It can be construed that the services, if any, that are rendered by the assessee, were indicative of rendering of services under the category which may fall under the head "Business Auxiliary Services" and more specifically under category (iii) which reads as "any customer service on behalf of the client". It is seen that the Show Cause Notice only charges for recovery of the amount under the head 'Airport service' which in our considered opinion will not be applicable in the present case.

11. Ld. DR heavily relied upon the decision of this Tribunal in the case of Sayaji Hotel Ltd., Final Order dated 25.01.11 and submitted that the services of sale of foods and beverages can be visited and service portion can be chargeable to service tax. We find that the said Final Order of the Tribunal has been stayed by the Hon'ble High Court of M.P. which would mean that the final order dated 25.01.11 of the Tribunal is in jeopardy.

12. In view of the foregoing, we are of the considered view that the services rendered by the assessee would not get covered under the category of "Airport services", as sought to be done.

13. Since we have disposed off the appeals, on the merits of the case it self, we are not rendering any findings on the various detailed

submissions made by both sides on several issues as they would be of academic nature.

13. Accordingly, the appeal filed by the assessee is allowed and the appeal filed by the Revenue is rejected.

(Pronounced in the open court on 22/06/2011)

(M.V.Ravindran)
JUDICIAL MEMBER

(M.Veeraiyan)
TECHNICAL MEMBER

RK-I

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FAX : 011-26108426 **REGISTERED / AD**

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

Dated: **06/03/2013**

To

Appellant as per address in table below

Respondent as per address in table below

Misc Order No. **, ST/MO/56564/2013 - CU[DB]** dated **28/02/2013**

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

Asstt. Registrar(CUSTOMS Appeal Branch)

	Application	Appeal	Name and Address of Appellant
1	ST/ROM/32/2011	ST/659/2007	**C.S.T. DELHI** 17-B, I.P. Estate, IAEA House, New Delhi.
			Name and Address of Respondent
2			**ITC WELCOMGOUP PORT LOUNGE** Terminal 1A, Indira Gandhi International Airport, N Delhi.

Copy To
3Advocate(s) / Consultant(s):

4 Bar Association, CESTAT, Delhi

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Satellite Road, Ahmedabad-15

10 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

12 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

13 C.D.R. **14** Office Copy **15** Guard File **16** Second Folder

Asstt. Registrar(CUSTOMS Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066.
DIVISION BENCH
Court No.2
ST/ROM/32/2011 in Appeal No.ST/659/2007

Date of Hearing/decision: 28.02.2013

CST, Delhi — Appellant
Vs
ITC Welcomgroup — Respondent

Present for the Appellant: Shri Amresh Jair, DR
Present for the Respondent: None

Coram: Hon'ble Mr.D.N.Panda,s Judicial Member
Hon'ble Mr.Manmohan Singh, Technical Member

MISC. ORDER NO. 56564/2013

PER: D.N.PANDA

Although miscellaneous application has been filed on 10/10/2011. There is none to represent nor is there any application for adjournment. Probably there is no cause for hearing the application for which MA is dismissed.

(Pronounced in the open court)

01.03.2013
(D.N.PANDA)
JUDICIAL MEMBER

04.03.2013
(MANMOHAN SINGH)
TECHNICAL MEMBER

mk