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

**% Date of decision: 04.11.2026**

\# **CNR No. DLHC010528522026**

\+ SERTA 32/2026, CM APPL. 75999/2026, CM APPL. 76000/2026 & CM APPL. 76001/2026

PRINCIPAL COMMISSIONER CGST AND CX DELHI (SOUTH) .....Appellant

Through: Mr. Anurag Ojha, SSC with Mr. Dipak Raj, Mr. Aditya Chaudhary & Mr. Ashish Chaudhary, Advs.

versus

M/S AIRPORT RETAIL PRIVATE LIMITED .....Respondent

Through:

**CORAM:**
**HON'BLE MR. JUSTICE AVNEESH JHINGAN**
**HON'BLE MS. JUSTICE SHAIL JAIN**

**AVNEESH JHINGAN, J. (ORAL)**

1. This is an appeal under Section 35G of the Central Excise Act, 1944 (hereinafter 'the 1944 Act') against the order dated 19.08.2025 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short 'the tribunal').

2. The brief facts are that the Delhi International Airport (Private) Limited (for short 'DIAL') under an agreement dated 04.04.2006 acquired the space of Delhi Airport on lease. By two subsequent agreements dated 09.11.2006 and 07.02.2008, DIAL granted licence to the respondent (earlier known as Alpha Future Airport Retail Pvt.

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Ltd.) to operate duty-free shops in the designated areas of the Delhi International Airport. The licence was granted for consideration of a fixed monthly licence fee, together with a share of the gross revenue generated from various categories of products sold in the duty-free shops subject to a minimum annual guarantee.

2.1 The respondent filed W.P.(C) 8554 of 2008 challenging the levy of service tax on rentals including royalties payable to DIAL for hiring space in the airport premises. The petition was allowed on 03.11.2009 relying upon the judgment in ***Home Solution Retail India Ltd. v. Union of India & Ors.***, 2009 (237) ELT 209 (Del.). On 30.06.2010, the respondent closed its operations at the Delhi Airport. A show cause notice dated 22.10.2010 was issued to DIAL for the period 2006-07 to 2009-10 demanding service tax for providing airport services in terms of Section 65(105)(zzm) of the Finance Act, 1994 (hereinafter 'the 1994 Act'). A similar notice dated 28.09.2011 was issued to DIAL for the period 01.04.2010 to 30.06.2010. This Court in W.P.(C) 4274 of 2010 titled ***Airport Retail Private Limited v. Union of India & Ors.*** held that the licence arrangement could not be subjected to service tax under Section 65(105)(zzm) of the 1994 Act and could not be considered as 'airport services'. The demand raised by the first show cause notice was set aside and *vide* order dated 05.09.2014, the respondent was granted liberty to file a claim for refund of service tax.

2.2 On 16.07.2015, the respondent filed a refund claim for Rs.11,73,30,977/-. *Vide* Order-in-Original dated 08.12.2016 (for short

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'O-I-O'), the refund claim was rejected. The Commissioner (Appeals) dismissed the appeal of the respondent *vide* order dated 05.06.2017. The respondent succeeded before the tribunal on 19.08.2025 and hence the present appeal.

3. The proposed substantial questions of law are as follows:

> "i. Whether the taxability of services stand vitiated by mentioning incorrect sub clause under service tax provisions?
>
> ii. Whether the hon'ble tribunal was correct in allowing refund to the assessee consequent to decision of Hon'ble High Court which decided that more appropriate heading for taxability in case of assessee is under clause (zzz) and not under (zzm)?"

4. Learned counsel for the appellant/department had earlier sought time to have instructions as to whether any issue of taxability is involved in the appeal. The questions proposed in appeal is of taxability. The O-I-O rejecting the refund decided the issue of taxability despite there being a decision of this Court *inter se* the parties.

5. The contention is that there is no issue of taxability as the respondent is not disputing the nature of the services rendered. Moreover, Section 65(105)(zzzz) of the 1994 Act was retrospectively amended with effect from 01.06.2007 and the judgment of this Court is no longer applicable. The agreement between the respondent and DIAL shall be governed by the amended provision. The service tax is leviable as the services subject matter of this case, after the

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amendment are covered under Section 65(105)(zzzz) of the 1994 Act. It is contended that the appeal is maintainable under Section 35G of the 1944 Act.

6. The contentions raised on the basis of specific instructions from the department are misconceived. The relevant paragraph of the O-I-O dealing with the issue of taxability is reproduced below:

> "8. Now I take up the issue at 6(b) above. It becomes relevant to discuss that the party has filed refund claim against Hon'ble High Court order W.P(C) No.4274/2010 dated 30.07.2014 and 05.09.2014 merely on the ground that 'taxable service' as defined under section 65(105)(zzm) of the Act (hereinafter referred to as the 'airport services') is not applicable in their case and not sustainable as per finance act, 1994. In the instant case Mr. Rajiv Mehra, learned ASG appearing for the Union of India has clearly clarified at point no. 24 of Hon'ble High Court order that whereas the services contemplated within the meaning of 'airport services' under clause (zzm) of section 65(105) of the Act are area specific, the services as contemplated under clause(zzzz) of section 65 (105) of the Act were activity specific. It was submitted that clause 65 (105) (zzzz) was activity specific and in general covered activity of leasing or licensing use of space. It was ascertained that if the said service/activity was carried out in respect of a space within the specific area of an Airport, the same would fall within the definition of 'airport services'. The clause (zzm) was introduced w.e.f 10.09.2004' and with effect from the said date all services rendered within the specific area of the airport would be excisable to service tax. Since, the license of immovable space was granted for a specific space within the specific area of the airport, the same fell within the definition of 'airport services' and were thus

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chargeable to service tax."

7. Before the tribunal the counsel of the department reiterated the findings recorded in the O-I-O, thereby pressing the issue that after the amendment of Section 65(105)(zzzz) of the 1994 Act the services were not covered by the decision of this Court. The contention was rejected by the tribunal and it was held that the judgment of this Court was applicable and the services rendered were not 'airport services'.

8. It would be apposite to quote Sections 35G (1) and 35L of the 1944 Act:

> ***"Section [35G.Appeal to High Court. -***
>
> *(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.*
>
> ***Section 35L. Appeal to the Supreme Court -***
>
> *[1] [(1)]An appeal shall lie to the Supreme Court from -*
>
> *[2] [( a) any judgment of the High Court delivered -*
>
> *( i ) in an appeal made under section 35G; or*
>
> *(ii) on a reference made under section 35G by the Appellate Tribunal before the 1stday of July, 2003;*
>
> *(iii) on a reference made under section 35H, in any case which, on its own motion or on an oral*

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*application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or].*

*(b) any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.*

*[3][(2) For the purposes of this Chapter, the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment.]"*

9. A plain reading of Section 35G (1) of the 1944 Act makes it clear that every order of the tribunal is appealable before this Court on a substantial question of law. The exception relates to determination of a question concerning the rate of duty of excise or value of goods for the purpose of assessment.

10. Section 35L of the 1944 Act deals with appeals to the Supreme Court. Clause (b) of sub-section 1 of Section 35L provides for an appeal to the Supreme Court against an order of the tribunal where the question relating to the rate of duty of excise or the value of goods for the purpose of assessment has been determined. Sub-Section (2) of Section 35L of the 1944 Act is inclusive in nature and provides that the expression "the question having relation to the rate of duty" includes the determination of taxability or excisability of goods for the

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purpose of assessment.

11. Though the issue involved in the present appeal is of refund but the department rejected the refund claim on the ground that the services were taxable after the amendment to Section 65(105)(zzzz) of the 1994 Act. This issue was also contested before the tribunal and a question of law is raised in the appeal on this issue.

12. In view of the unambiguous language of Section 35L of the 1944 Act, the appeal is dismissed as not maintainable.

13. All pending applications are also disposed of.

14. Needless to say, the appellant shall be at liberty to avail remedies in accordance with law.

**AVNEESH JHINGAN, J**

**SHAIL JAIN, J**

**NOVEMBER 4, 2026**
*'JK'*

Reportable: **Yes**

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