

User Development Fee collected by an international airport a statutory levy, not liable to service tax – SC

24 May 2023



Summary

The Supreme Court (SC) has ruled that the User Development Fee (UDF) or Development Fee levied and collected by the airport operation, maintenance and development entities from departing passengers is a statutory levy and, thus, is not subjected to the service tax under the provisions of the Finance Act, 1994. The SC held that the UDF is in nature of tax or cess and cannot be construed as a consideration against the provision of any service.

Facts of the case

- The Delhi International Airport Private Limited, Mumbai International Airport Private Limited and the Hyderabad International Airport Private Limited (Assessees) had entered into an agreement/arrangement for operation, maintenance and development (OMD) of the respective airports with the Airports Authority of India (AAI). The Assessees were authorised to collect a User Development Fee (UDF) or Development Fee from the departing passengers.
- Subsequently, various show cause notices were issued demanding payment of service tax on the Development Fee so collected along with penalty.
- Orders issued by the original authority were challenged before Customs, Excise and Service Tax Appellate Tribunal (CESTAT), which allowed the Assessees to appeal and held that the Development Fee should not be exigible to service tax.
- Against this, the department filed an appeal before the Supreme Court.

Supreme Court's observations and order (Civil Appeal No. 8996/2019 dated 19 May 2023)

- **Development Fee is a statutory exaction and cannot be equated with fees or tariffs:** The SC opined that the Development Fee collected does not qualify as charges or any consideration for services for the facilities provided by the AAI. The SC drew reliance from its judgement in Consumer Online Foundation, wherein the SC categorically differentiated between the charges, fees and rent and Development Fee. It was noted that charges, fees and rent were collected for providing services under a contractual relationship, whereas the

Development Fee collected from passengers was in the nature of a statutory obligation.

- **No element of rendering taxable service to levy service tax:** To attract a levy of service tax, a taxable service has to be provided by a service provider to the recipient for a consideration. In the absence of any nexus to any service rendered, an amount charged would not be a taxing incident. The UDF is collected and kept in a separate escrow account, and AAI is empowered to monitor and regulate its receipts and utilisation.
- **Development Fee is in the nature of tax:** The SC observed that unlike fees, rent, charges, etc., the Development Fee could only be utilised for a specific purpose, but such utilisation was subject to approval. Furthermore, no additional benefit accrued to the passengers against payment of the UDF. The SC opined that UDF was a form of 'tax or cess' collected for the purpose of bridging the funding gap of project cost for the development of airports in future.
- **Service tax cannot be levied on other taxes:** The SC invoked the Central Board of Excise and Customs (CBEC) circular and affirmed that service tax should not be levied on the collection of amounts in the nature of taxes, sovereign or statutory dues. Drawing reference from its judgement in the Krishi Upaj Samiti case, the SC observed that the Development Fee was a statutory levy irrespective of the fact that it was not a compulsory levy nor was its collection conditional upon its deposit in the government treasury.

Our comments

This is a significant judgement which not only clarifies the age-old dispute on UDF taxability to the airport operator but also provides guidance in navigating issues pertaining to the inclusion/exclusion of statutory levies for the determination of tax.

Though this ruling pertains to the service tax regime, observations and principles of this judgement will trickle down and will have a far-reaching impact under the Goods and Services Tax (GST) regime as well.

Contrastingly, under GST, the Central Board of Indirect Taxes and Customs (CBIC) had clarified by way of a circular that services provided by an airport operator to passengers against consideration in the form of Passenger Service Fee (PSF) and UDF are leviable to GST. It would be interesting to watch out for further developments under GST in this regard.

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