2021Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 11018 of 2021 - DB

(Arising out of OIO-AHM-EXCUS-002-COMMR-28-2021-22 dated 29.10.2021 passed by Commissioner of Central Excise, Customs and Service Tax- AHMEDABAD)

Rajpath Club Ltd. **........Appellant**
S.G.Highway, Ahmedabad
Gujarat-380058

VERSUS

COMMISSIONER OF CENTRAL EXCISE, AHMEDABAD-II
...Respondent
1st Floor, Custom House, Navrangpura,
Ahmedabad, Gujarat-380009

APPEARANCE:
Shri Bishan R. Shah, Chartered Accountant, appeared for the Appellant
Shri G Nair, Assistant Commissioner (AR), appeared for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No. 11319/2024

DATE OF HEARING: 01.02.2024
DATE OF DECISION: 13.06.2024

RAMESH NAIR

The brief facts of the case are that during the course of audit for the period from October 2013 to June 2017, it was observed that appellant has taken Cenvat credit on imported Health Fitness Equipment. According to audit team Cenvat Credit availed is not admissible to the Appellant in terms of Rule 3(1) of Cenvat Credit Rules, 2004. Further it was observed by the audit that appellant has availed Cenvat credit on TMT bars and Ready Mix Concrete during 2014-15 to 2016-17 amounting to Rs. 16,57,308/- the same was not eligible in terms of Rule 2(K) of CCR , 2004. It was also observed by the audit that appellant was providing space and infrastructure to M/s Swagat Caterers Pvt. Ltd. and M/s. Somani Hospitality Services in order to provide restaurant services to its members. The Appellant was taking 10% of gross amount as revenue share form the same receipts. The

Appellant received Rs. 74,00,312/- as revenue share from these service providers for the period from October 2013 to March 2016. Accordingly to the department the appellant was liable to pay service tax on said amount. Further it was noticed by the department that appellant has let out its space and other infrastructures facilities to various entities and Appellant has recovered electricity burning expenses on actual basis from these parties operating from their premises. The Appellant recovered electricity burning charges of Rs. 86,03,500/- for the period from October 2013 to March 2016. According to the revenue the appellant was required to pay service tax on said recovered charges in terms of Section 67(1)(a)(i) of the Finance Act, 1994 and Rule 5 of the valuation Rules. Accordingly, a detail show cause notice was issued to the appellant proposing to demand of service tax and disallowance & recovery of cenvat credit amount along with interest and also for imposing penalties. In adjudication the Ld. Commissioner vide impugned order-in-original No. AHM-EXCUS-002-COMMR-28/2021-22 dtd. 29.10.2021 confirmed the cenvat credit demand and Service tax demand on revenue share amount and reimbursable amounts. Being aggrieved the appellant is before this Tribunal.

2. Shri Bishan Shah, Ld. Chartered Accountant appearing on behalf of the appellant submits that the appellant is a members' club individually they are members and collectively they are called club. As decided by the Hon'be Gujarat High Court in their own matter and affirmed by Hon'ble Supreme court in CA 7771 of 2019 that demand of Service tax in the case of member's club is void and there was no service tax liability on them and hence question of availment of Cenvat Credit does not arise.

2.1. He further submits that according to principle of mutuality a person cannot give services to the self, the Appellant has applied for the refund of amount of Service tax paid by them from time to time and same has been refunded to them by the department after due verification. It is worth to note that while claiming the refund, the appellant has claimed the refund of service tax paid in cash only, meaning thereby issue of availment of credit is no longer exist due to finality of Hon'ble Apex Court. Hence, the question of demanding Service tax by reversal does not arise. Since output is not taxable, the question ofavailment of input CENVAT Credit does not arise.

2.2. As regard the issue of non-payment of Service tax on reimbursement received for electric burning expenses he submits that Electricity is a Goods and chargeable to NIL rate of Central Excise Duty. Moreover, the amount is received from the members only and on the basis of principle of mutuality it is not taxable. According to Principle of Mutuality a person cannot give services to the self. He placed reliance on the decision in the case of JJ Patel & Brothers Vs. CCE & ST. Surat –I [STA No. 13002 of 2019).

2.3. He also argued that the appellant is governed by Companies Act and being members club their financial are also cerculated widely to all the members. Since everything is in the knowledge of the department and while granting the refund the same has been called and verified, therefore the question of invokation of extended period does not arise.

3. Shri G. Nair, Ld. Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned orders.

4. We heard both the sides and have carefully considered the submission made by both the sides and perused the records. It is

undisputed facts that the appellant is engaged in providing clubservices and other related services and is thus registered with the service tax department since the introduction of Club and Associationservices in the Finance Act from 16-6-2005 by inserting the taxable service under Section 65(105)(zzze) of the Finance Act, 1994. The appellant has filed Special Civil Application before the Hon'ble High Court of Gujarat Ahmedabad challenging the constitution validity of Section (65)(25a), Section 65(105)(zzze) and Section 66 of Finance Act, 1994 against the said provision denying that the service tax legislation cannot be made applicable on the petitioner's club (Appellant). The Hon'ble High Court of Gujarat allowed the said writ petition of the appellant by holding that "Section 65(25A), Section 65(105)(zzze) and Section 66 of the Finance Act (No.2) Act 1994 is incorporated/ amended by the Finance Act, 2005 to the extent that the said provision purport to levy service tax of services purportedly provided by the petitioner club to its members to be ultra vires". The said order is affirmed by Hon'ble Supreme Court in case of State of West Bengal Vs. Culcutta Club -2019-TIOL-449-SC-ST-LB *supra.* The law laid down in *Calcutta Club* is that a club and its members are one and the same and the club is formed for the purpose for mutual benefit of its members. Therefore, any amount paid by the members to the club and the services rendered by the club to its members are self service and cannot be taxed.

4.1. We find that appellant strongly argued that the disputed cenvat credit which were availed by them already reversed on monthly basis as refund of service tax for the same period is claimed as per the Judgments of Hon'ble High Court and Apex court *(supra).* since output is not taxable. Appellant also submitted the copy of refund order before us. By going through the refund Order No. GST-06/Refund/21/AC/KMM/Rajpath/2017-18 dtd. 28.11.2017 we also noticed that department has sanctioned the refund claim amount which was paid by the appellant through cash /challan only. Since, the disputed Cenvat credit amount reversed / paid by the appellant, it has to be construed that no Cenvat credit was at all taken by the appellant attributed to their output services which are not taxable during the disputed period as per law laid by Hon'ble High Court supra.We are also of the view that once the reversal of the Cenvat credit has taken place, that tantamount to not availing of the cenvat credit. While holding this view we take support of the decision of the Hon'ble Supreme Court in the case of *Chandrapur Magnet Wires (P) Ltd.* v. *Collector of Central Excise, Nagpur* - 1996 (81) E.L.T. 3 (S.C.).

4.2. As regard the demand of Service tax of Rs. 9,36,912/- confirmed by the Ld. Commissioner under the category of 'renting of immovable property services' on revenue share amount received by the appellant from M/s. Swagat Caterers Pvt. Ltd. and M/s Somani Hospitality Services, we find that the purpose of the club is to serve their members and not to provide any service relating to business or commerce, the club do not have any profit making motive out of the facilities provided to the members. The objective of the club to have restaurant in the premises is for the benefit of the members. Therefore the club entered into agreement with M/s. Swagat Caterers Pvt. Ltd. and M/s Somani Hospitality Services to operate restaurant jointly inside premises of the club. These restaurant service providers were raising food bill of restaurant to members and were paying service tax on the full value amount received. The both the service providers were paying 10% revenue share to the appellant as per the agreement. The club provide all facilities like air conditioning, electrical installation, music systems, light and other fittings, crockery, cutlery, service ware, linen, kitchen utensils and banqueting materials. Both the service providers are allowed to utilize all these facilities. The club retained certain amount towards water, electricity, maintenance, etc. work. Facilities of food and beverages are provided by both the service providers for the members and their guests. In impugned matter it is on record and also it is clear from agreement that Appellant has provided the premises for arrangement of restaurant to Club and their members only. There is no agreement between them for giving any immovable property on rent. It is on records that both the service providers provided their services to club members only. For renting there must be fixed span or monthly basis on payment of rent as per transfer of immovable property. In the present matter tenant is not in absolute possession. In case of rental property tenant enjoy the right to use and possession of the property rented. Further, sharing clause between the parties does not change the colour and reduce the arrangement between the parties as that of landlord and tenant. In principle, the appellant has not delivered the possession of club to both the service providers by way of tenancy but has only given the right to manage and operate the restaurant into the club for their mutual benefit, on principle to principle basis. Accordingly, we hold that the Service Tax demand on revenue sharing amount under the category of renting of immovable property services are not attracted.

4.3. In the present matter we also find that M/s Swagat Caterer Pvt. Ltd. and M/s. Somani Hospitality Services are not in possession of restaurant place & kitchen. The same is always with the appellant. Further the alleged revenue sharing amount is retained by the appellant is for meeting common expenses incurred by the club for restaurants on the basis of concept of mutuality. That the appellant had retained certain amount towards meeting the expenses incurred by the club. The said retention amount is not the value of any Renting of immovable Property Services rendered by the appellant to M/s. Swagat Caterers Pvt. Ltd. and M/s.

Somani Hospitality Services. Therefore in our considered view, appellant are not liable to pay Service tax on such revenue share amount under "Renting of Immovable Property Services".

4.4. As regard the demand of Service tax of Rs. 10,89,822/- confirmed on the reimbursable amount of Rs. 86,03,500/- the Ld. Commissioner found that the appellant had let out its spaces and other infrastructure facilities to various entities like M/s Beauty Salon, M/s Shree Elora Decorators, M/s Janta Corporation, M/s Shibani Chocolates etc., apart from the agreed annual contract charges, the appellant were also recovering an amount from each of the entity in the name of reimbursement of electricity burning expenses. Accordingly, held that the recovery/reimbursement of electricity burning charges would be part of provision of service and liable to service tax under the category of "Renting of Immovable Property Service". We find that this issue is no longer *res integra* as the same has been decided time and again in the following decisions :-

- *ICC Reality (India) Pvt. Ltd*. v. *CCE, Pune*- 2013 (32) S.T.R 427 (Tri. - Mumbai)

> *9. We have gone through the Lease Agreements. As per the terms and conditions of the Lease Agreements, the tenants have to pay electricity charges directly to the MSEB and the appellants are also providing electricity through generator set in case there is a power failure and the appellants are charging for the same. We find that electricity is specifically covered under Tariff Heading 27 of the Central Excise Tariff Act. We find that as per the provisions of Maharashtra Value Added Tax Act, 2002, electricity is also covered under Schedule A Sr. No. 20 and charged to Nil rate of tax. In view of this, we find the electricity is goods chargeable to duty under Central Excise*

Tariff as well as under the Maharashtra Value Added Tax Act, 2002. Therefore, the supply of electricity to tenant amounts to sale of goods and not supply of service. Further the Notification No. 12/2003-S.T., dated 20-6-2003 exempt from Service Tax, any value of goods supplied by service provider to service recipient. Further we find that the Commissioner of Central Excise Pune-III vide Order-in-Original dated 28-11-2011 relied upon by the appellants dropped the proceedings which were initiated on the same ground in the case of M/s. Panchshil Tech Park Ltd. The Commissioner of Central Excise in the adjudication order held that electricity is goods and chargeable to Nil excise duty. The decision of the adjudicating authority is accepted by the Revenue as per the communication dated 26-9-2012 by the Commissioner of Central Excise, Pune-III. The present appellants are also under the jurisdiction of Pune-III Commissionerate.

10. In view of the above discussion, we find merit in the contention of the appellants that the electricity charges collected from the tenants cannot be formed part of the assessable value for the purpose of Service Tax as provider of renting of immovable properties.

11. Impugned orders are set aside and the appeals are allowed.

- *M/s. Hotel Lake View Ashok* v. *CGST, CE and CC, Bhopal* - 2018-TIOL-2891-CESTAT-DEL

5. We have heard both the sides and have also perused the record of the appeal. It is a matter of record that appellants have been *charging 20% of sales proceeds from "Shan-e-Bhopal Restaurant" as a commission for providing support service to business in the form of providing space for the restaurant and other infrastructure support which included the premises for housing restaurant, manpower, security service, etc. It is also a matter of fact that electricity and water charges have also been recovered by the appellant from the restaurant owner on actual basis and same has been deposited with the respective authorities providing electricity and water to the said premises. It has also been argued that so far as the Service Tax on 20% commission charges is concerned, the appellant has also deposited the same with the Government exchequer and wherever there has been any delay in payment of Service Tax, same has been deposited with due interest leviable thereon.*

6. In view of the above, the only question which remains before us for deciding is whether the electricity and water charges recovered by the appellant will form part of the value of the service as per the provisions of Finance Act, 1994 or not. It can be seen that electricity and water services are being provided by other Government agencies and the charges for use of the said facilities is being raised on the service provider i.e. the appellant on actual basis which the appellant is collecting from the "Shan-e-Bhopal Restaurant" and same is deposited with the authorities providing electricity and water. In view of these facts, it can be concluded that the appellant is purely working as an agent in collecting the charges with regard to supply of water and electricity and deposited the same with authorities concerned. The provisions of Rule 5(2) of Service Tax (Determination of Value) Rules provides that wherever the expenditure cost incurred or received by the service provider as a pure agent, same shall be *excluded from the taxable value of the service. As all the conditions provided in Rule 5(2) of Service Tax Valuation Rules, 2006 are satisfied, we are of the opinion that appellant has behaved purely as and agent and the charges of electricity and water cannot be included in the taxable value of the services, namely support service of business provided by the appellant. In view of the above, we hold that - (i) The appropriate Service Tax is payable on 20% commission charged by the appellant from "Shan-e-Bhopal restaurant" for providing the premises and other infrastructure facilities. (ii) However, the charges collected by them towards electricity and water, are not to be included in the taxable value for charging Service Tax.*

7. In view of the above, we do not find any merit in the order passed by Commissioner (Appeals) and accordingly, we set aside the same. The appeal is allowed.

- *M/s. S.B. Developers Ltd*. v *CST, New Delhi* - 2018-TIOL-1866-CESTAT-DEL

> *4. The demand raised and confirmed by the Revenue is on various grounds which are discussed below" -*
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> *4.(i) The appellant received electricity from the Grid and in addition also had the capacity to generate electricity using generators. They supplied electricity from both sources to the tenants of the Mall and the payment therefore was collected by the appellant. But only in respect of the electricity received from the Grid, the charges are paid to the Grid. The Department was of the view that the charges recovered for the electricity generated by the appellant using generators and*

supplied to the tenants, are to be included in the maintenance charges recovered from the tenants by the appellant and such amounts will be liable to payment of Service Tax.

(ii) Ld. Advocate for the appellant submitted that the appellant was collecting electricity charges from the tenants and depositing the same with the Electricity Board. He specifically contended that the total amount paid to the Grid by way of electricity charges in the various years was much more than the electricity bills reimbursed to the appellant by the tenants. Accordingly, he submitted that the demand of Service Tax on the electricity charges cannot be sustained. In this connection, he relied on the decision of the Tribunal in the case of Anandram Developers Pvt. Ltd. v. CST, Chennai - 2017 (6) G.S.T.L. 75 (Tri. - Chennai).

(iii) Opposing the argument, Ld. AR submitted that the appellant will be not liable to pay Service Tax only in respect of the electricity charges recovered from the tenants and paid to the Electricity Board. He submitted that the adjudicating authority has upheld the demand in respect of the electricity charges recovered by the appellant as part of their maintenance charges. He contended that the electricity generated and supplied by the appellant to the tenants and covered by the agreement with the tenants will be liable to payment of Service Tax under the category of maintenance.

(iv) In the case ofICC Reality India Ltd., the Tribunal had occasion to consider whether the reimbursement of electricity charges from tenants is to be included in the consideration for

payment of Service Tax in the category of renting of immovable property. The observation of the Tribunal is reproduced below :

"9. We have gone (sic) that electricity is goods and chargeable to Nil excise duty. The decision of the adjudicating authority is accepted by the Revenue as per the communication dated 26-9-2012 by the Commissioner of Central Excise, Pune-III. The present appellants are also under the jurisdiction of Pune-III Commissionerate."

(v) By following the above decision which has further also been followed in other cases, we conclude that there can be no levy of Service Tax on the electricity charges which are reimbursed to appellant by the tenants. However, on a perusal of the agreement entered into by the appellant with the tenants, we note that the tenant is also liable to pay to the appellant for the electricity generated by the appellant and supplied to the tenant as part of the maintenance agreement. The Ld. Advocate has drawn our attention to the fact that in the various years, the total amount of payment to the electric supply undertaking by the appellant is much more than the total amount of electricity charges recovered from the tenants. From the figures, we are unable to come to the conclusion regarding the amount of electricity generated by the appellant and supplied to the tenants by using thereon generating sets. The payment for which is includible in the maintenance charges. In this connection, we direct the adjudicating authority to allow the claim of the appellant with respect to reimbursement of electricity charges from tenants in respect of electricity received from the Grid. At the same time the

appellant is directed to submit before the adjudicating authority the details of electricity generated by them and supplied to the tenant and the charges recovered therefor. This will be includible in the consideration of maintenance charges and liable to Service Tax.

- *Commissioner of GST and Central Excise, Chennai* v. *M/s. Ticel Bio Park Ltd*. - 2018-TIOL-2195-CESTAT-MAD

5. The Revenue is aggrieved by the order passed by the Commissioner (Appeals) who set aside the entire demand. The demand in respect of electricity charges and air-conditioning charges being reimbursable expenses, we are of the view that these cannot be included in the total value of taxable services. For this we take sustenance from the decision of the Tribunal vide Final Order Nos. 41806 & 41807/2017, dated 28-8-2017 in the case of M/s. Plaza Maintenance and Service Ltd. This issue is found against the Revenue, and we uphold the order passed by Commissioner (Appeals) on setting aside demand on electricity charges and air-conditioning charges.

6. On perusal of records, as per lease deed, the respondent is under obligation to maintain common areas and provide various amenites. The amount collected as operation and maintenance charges represents charges for maintenance of the building rented out to the clients. The defense put forward by the Ld. Counsel for respondent is that these charges are integral part of the rent. Though, the respondent has included such charges under Renting of Immovable Property Service and is discharging Service Tax under such category after 1-6-2007, the issue whether they were providing any maintenance service prior to 1-6-2007 and whether these will fall

> *under MMR services has to be looked into. For this reason, we find that the matter requires to be remanded to the adjudicating authority who shall look into the issue whether the demand on operation and maintenance charges will sustain. The adjudicating authority shall also consider the issue of limitation as put forward by the Ld. Counsel for the respondent.*
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> *7. The appeal filed by the department is partly remanded in the above terms.*

In view of the above judgments, the issue involved herein has been settled inasmuch as the electricity charges reimbursed to the service provider by the service recipient is not includible in gross value of renting of immovable property service. Following the ratio of the above judgments, we are of the view that the demand is not sustainable.

5. In view of the above discussion, we find that the demands confirmed in the impugned order cannot be sustained. Accordingly the same is set aside. Appeal is allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 13.06.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Arpita