CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/20148/2018-SM

[Arising out of OIA No. TVM-EXCUS-000-APP-260-2017
dated 20/11/2017 passed by Commissioner of Central Tax ,
COCHIN(Appeal)]

Gateway Hotel
Janardhanapuram Varkala
THIRUVANANTHAPURAM
KERALA
695141

Appellant(s)

Versus

Commissioner Of Central Tax And Central Excise, Thiruvanthapuram
P.B.No.13, I.C.E Bhawan, Press Club Road
Thiruvanthapuram
Kerala
695001

Respondent(s)

Appearance:

Shri JOSE JACOB, Advocate
#41/3787, 1ST FLOOR,
CARMEL CENTRE, BANERJI ROAD,
KOCHI
KERALA
682018

For the Appellant

Shri Madhupsharan, Asst. Commissioner(AR)

For the Respondent

Date of Hearing: 09/04/2018
Date of Decision:___________

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. _______________

Per : S.S GARG

The present appeal is directed against the impugned order dt. 20/11/2017 whereby the Commissioner(Appeals) has rejected the appeal of the appellant and upheld the Order-in-Original.

2. Briefly the facts of the present case are that the appellants are a public limited company incorporated under the provisions of the Companies Act, 1956, engaged in the running of a chain of reputed five star hotels and resorts across the state of Kerala. During the relevant period, the appellants were providing only taxable services and with respect to accommodation and restaurant service, the appellants were discharging service tax on abated value as per the Notification No.26/2012 dt. 20/06/2012. The appellants were issued a show-cause notice dt. 17/04/2015 alleging that the appellants are providing exempted service of accommodation service and restaurant service and being providers of taxable and non-taxable services are in violation of the CENVAT Credit Rules by not maintaining separate accounts under Rule 6(3) of the CENVAT Credit Rules. In reply to the show-cause notice, appellant submitted that they are not providing any exempted service and by virtue of which Rule 6(3) of the CCR with respect to maintenance of separate accounts would not be applicable to the appellants. After following the due process, the Additional Commissioner vide Order-in-Original dt. 14/10/2015 confirmed the demand of Rs.12,93,192/- towards the alleged non-reversal of CENVAT credit during the relevant period and also confirmed the levy of interest and imposition of penalty under the relevant provisions of CCR. Aggrieved by the said order, appellant filed appeal before the Commissioner(Appeals) who rejected the same.

3. Heard both sides and perused records.

4.1. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without appreciating the facts and the law. He further submitted that the appellants are not providing any exempted service and therefore Rule 6 of CCR is not applicable. Learned counsel further referred to the definition of exempted services as provided under Rule 2(e) of the CCE which is reproduced herein below:-

> *Rule 2(e) "exempted service" means a -*
> *(1) taxable service which is exempt from the whole of the service tax leviable thereon; or*
> *(2) service, on which no service tax is leviable under section 66B of the Finance Act; or*
> *(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;*
>
> *but shall not include a service -*
> *(a) which is exported in terms of rule 6A of the Service Tax Rules, 1994*;

4.2. The learned counsel also submitted that perusal of the definition of exempted services clearly shows that where part of the value of service has been exempted with a condition that CENVAT credit on inputs and input services has not been availed, the same would be covered under the definition of exempted services as defined under Rule 2(e) of the CCR. He also submitted that in the present case, the appellants have availed the benefit of abatement with respect to accommodation service as per Sl.No.6 of the Notification No.26/2012 dt. 20/06/2012 and as per the said entry, 40% of the value of accommodation service has been exempted from the levy of service tax on the condition that CENVAT Credit on inputs and capital goods used for providing the taxable service has not been taken under the provisions of CCR. He also brought to my notice that there is no restriction with respect to availment of CENVAT credit on input services. Further with respect to restaurant service, he submitted that the appellants are not availing any abatement notification and as per Rule 2C of Service Tax (Determination of Value) Rules, 2006, the value of service portion involved in supply of food or any other article of human consumption or any drink in a restaurant has been fixed as 40% of the total value, on the condition that CENVAT credit on inputs classified under Chapters 1 to 22 of the CETA, 1985 is not taken.

5. On the other hand, the learned AR reiterated the findings of the impugned order.

6. After hearing both sides and perusal of material on record, I find that the appellant is not providing any exempted service because his case does not fall in the definition of exempted service. On the analysis of the definition of input service, I find that the three services are covered under the aforesaid definition of exempted services viz.

i. Any taxable service which is exempt from whole of service tax by way of exemption notification which would otherwise be taxable;

ii. Services which are listed in Section 66D of the Act as negative list of services on which no service tax is levied under Section 66B of the Act shall be treated as exempted service;

iii. Services where part of it has been exempted by way of abatement notification with a condition that no CENVAT credit shall be availed on inputs and input services used in providing such services.

However, I find that appellants are only availing the benefit of abatement in respect of the accommodation service as per Notification No.26/2012 dt. 20/06/2012 and as per the said Notification, 40% of the value of the accommodation service has been exempted from the levy of service tax on the condition that the CENVAT credit on inputs and capital goods has not been taken. In the present case, the appellant has not taken any CENVAT credit on inputs and capital goods. Further I find that there is no restriction with respect to availment of CENVAT credit on input services. As far as restaurant services are concerned, I find that the appellant is not availing the abatement notification and as per Rule 2C of Service Tax (Determination of Value) Rules, 2006, only 40% of the total value is taxable and the only condition attached with this is that CENVAT credit on inputs classified under Chapter 1 to 22 of the CETA, 1985 is not availed. When the statute itself prescribed certain percentage of total value as the value of service, the remaining portion of the value would neither be considered as an abatement nor as an exemption and consequently the restaurant services would not be covered under the definition of exempted services and hence the provisions of Rule 6 of CCR is not applicable in the present case. Further, I find that in the appellant's own case, for the subsequent period, the Assistant Commissioner vide Order-in-Original No.44/ST/DIV(AC)/2017-18 dt. 31/10/2017 has dropped the demand in the show-cause notice raised on identical grounds.

7. In view of my findings above, I am of the view that the appellants are not required to comply with the provisions of Rule 6 of CENVAT Credit Rules. Therefore, the impugned order is not sustainable in law and the same is set aside by allowing the appeal of the appellant with consequential relief, if any.

(Order was pronounced
in Open Court on **......................**)

S.S GARG
JUDICIAL MEMBER

Raja....