IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

ST/120/2010

(Arising out of Order-in-Original No.42/2009 dated 29.9.2009 passed by the Commissioner of Service Tax, Chennai)

M/s. Auromatrix Hotels Pvt. Ltd. Appellant

Vs.

Commissioner of GST & Central Excise
Chennai Respondent

Appearance

Ms. Radhka Chandrasekar, Advocate for the Appellant
Shri K. Veerabhadra Reddy, ADC (AR) for Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing :18.12.2018
Date of Pronouncement :18.02.2019

Final Order No. **40308 / 2019**

Per Bench

The appellants are providing consultancy and management services to hotels and resorts. They are registered under the category of Management Consultancy Services and Intellectual Property Service. During the course of audit of accounts, it was noticed that they did not pay service tax within the prescribed statutory due dates and belated the payment of service tax for the period from April 2007 to December 2007.

Further, they did not discharge appropriate service tax demand on the gross service charges received by them. On verification of profit and loss account for the year 2006 – 07, it was noticed that the assessee had a difference of Rs.2.50 crores when compared to the value realized as shown in the ST-3 returns. The reason attributed by the assessee was that the amount relates to value of the property which they have acquired in lieu of management fees for the service rendered to their client under Management or Business consultant Services. The appellant had not discharged service tax on the value of the property which was received as consideration for termination of the agreement so as to settle against termination of services. Show cause notice dated 15.5.2008 was issued proposing to demand service tax to the tune of Rs.64,13,890/- along with interest and also proposing to appropriate an amount of Rs.33,53,890/- as well as interest of Rs.2,37,093/- which was already paid by them. The show cause notice also proposed to impose penalties. After due process of law, the original authority confirmed the demand of Rs.64,13,890/- for the period April 2006 to December 2006 along with interest and also imposed penalty of Rs.75 lakhs under section 78 of the Finance Act, 1994 with option to pay reduced penalty of 25%. Aggrieved, the appellants are now before the Tribunal.

2.1 On behalf of the appellant, ld. counsel Ms. Radhika Chandrasekar explained that the appellants entered into a resort operation and licence agreement dated 14.4.2005 with M/s. Sterling Holiday Resorts India Ltd. (SHRIL for short). As per the agreement, the appellant was entrusted with the responsibility of operating 11 resorts owned by SHRIL. For rendering such services, SHRIL was to pay various charges to the appellant. However, both the parties, that is the appellant herein and SHRIL reviewed the agreement and mutually agreed to terminate the above service agreement by Final Settlement Agreement dated 1.3.2006. As per the settlement agreement, it was agreed that balance of Rs.3,29,81,431/- was payable after considering other amounts. Towards this balance, an immovable property to the value of Rs.2.50 crores was adjusted. On the entire consideration that was agreed to be paid in nature of money by SHRIL as part of settlement, the appellant has fully discharged the service tax. The appellant is not therefore contesting the service tax of Rs.33,53,890/- which is already paid.

2.2 The contest in the present appeal is with regard to the demand of service tax on Rs.2.50 crores being the value of the property which was adjusted towards the final settlement amount. The agreement dated 1.3.2006 is in the nature of settlement which involved handing over of the property as part of the settlement. The transaction of transferring of the property was consummated on the date of execution of settlement agreement which is 1.3.2006.

2.3 Section 67 of Finance Act, 1994 as it stood during the relevant period, prior to 18.4.2006, contemplates levy of service tax on gross amount charged in nature of money only. Thus any consideration received other than money was not subject to levy of service tax prior to 18.4.2006. The department has referred in the show cause notice the said section as it stands after the amendment with effect from 18.4.2006. Therefore, the demand of service tax on the value of immovable property is incorrect. Section 67(1)(ii) prior to 18.4.2006 contemplates amount in money, which is equivalent to the consideration. Consideration also includes amount that is payable. Therefore levy can be made only when consideration is passed on in the nature of money. Further as per Rule 6(1) of Service Tax Rules, service tax shall be paid on the payments received and service tax is on receipt basis.

2.4 The settlement amount was arrived by mutual agreement and then the mode of payment of such settlement was both in nature of money and property. As the settlement took place prior to 18.4.2006, even if property was received as consideration, the value of such property cannot be subject to levy of service tax. Moreover, the provision of services was completed on 1.3.2006, when the final settlement had been executed between the parties. It was agreed by the parties to terminate the agreement for providing services as well as for paying charges for the services. The agreement was thus agreed to be freezed by parties. After 1.3.2006 there has been no rendering of service by appellant to SHRIL.

2.5 The appellant had discharged the service tax on the amount received in the nature of money in lieu of settlement agreement even though some amount was received after 18.4.2006. This is because all along the consideration received in the form of money was subject to levy of service tax and service tax is leviable on the consideration payable on the services already provided. Further service tax was payable during the disputed period on receipt basis. The appellant is therefore not contesting the service tax relating to consideration in money and is contesting the demand of service tax only on the amount relating to the value of the property acquired by them towards the final settlement. She also submitted that the point of taxation rules have come into effect only in 2011 wherein the service tax is thereupon liable to be discharged on accrual basis instead of receipt basis.

3. In grounds para 33, 34 and 35, the appellants have contested the penalties imposed. It is submitted that the service tax of Rs.33,53,890/- and interest of Rs.2,93,093/- was paid on 27.3.2008 which is much before issuance of show cause notice which is dated 15.5.2008. She prayed to set aside the penalties.

4. The ld. AR Shri K. Veerabhadra Reddy supported the findings in the impugned order. He submitted that as per Section 67, the appellants are liable to pay service tax upon the

monetary value of the immovable property received by them which is also consideration for final settlement of providing the service. The appellant has discharged service tax on amounts received by them in cash after 1.3.2006. The immovable property is consideration for services provided after 1.3.2006 and therefore the immovable property is the consideration for provision of services from April 2006 to December 2007 and is subject to levy of service tax as per the amended provision of Section 67. Thus, a portion of the amount settled by way of selling the property was meant for the services to be provided for the period from1.4.2006 to 31.3.2007, which period is after date of settlement agreement. Thus, the sale of property was made for the value of services for the past and future services between the appellant and SHRIL. It is also submitted by him that the sale deed for transfer of the property was executed much later and therefore the value of the property would any how be subject to levy of service tax as per the amended provisions of Section 67. Further from the agreement, it is clear that the services were provided for monetary consideration and entered in the books of accounts in terms of money only. Merely because a portion of the service charges was paid by the service provider by way of immovable property, does not take away the liability to pay service tax.

5. Heard both sides.

6.1 The assessee is contesting only the demand of service tax raised on the value of immovable property which was given to them as part of settlement deed.

6.2 M/s. SHRIL had entered into an agreement with the appellant for operating the various resorts owned by SHRIL. However, both the parties later agreed mutually to terminate the above agreement by a final settlement agreement dated 1.3.2006. The relevant portion of the settlement agreement is reproduced as under for better appreciation of the facts:-

> "AND WHEREAS the parties have had detailed discussions with regard to the settlement of accounts and the mode of payment of the settled accounts consequent to the termination of the said agreement and mutually agreed to freeze the amount payable by STERLING under the agreement dated 14.4.2005 as per the details given in the Annexure A.
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> AND WHEREAS both the parties have agreed to put an end to the resort operation and license agreement and full and final settlement, both dated 14.4.2005 without recourse to any of the clauses of the said agreement except to the extent as stated hereunder:-
>
> 1. Sterling confirms that a sum of Rs.3,34,81,431/- (Rupees three crores thirty four lakhs eighty one thousand and four hundred and thirty one only) is payable to AUROMATRIX as per the terms of the Resort Operation & License Agreement and Full and Final agreement both dated 14.4.2005 upto the period ending 31.3.2006. This amount of Rs.3,34,81,431/- (Rupees three crores thirty four lakhs eighty one thousand and four hundred and thirty one only) is mutually agreed upon and this will not be questioned by either parties of this agreement.
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> 2. AUROMATRIX confirms and acknowledges that they have so far received a sum of Rs.1,25,00,000/- (Rupees one crore twenty five lakhs only) against the amount payable as stated in clause 1 herein above leaving a balance of Rs.2,09,81,431/- (Rupees two crores nine lakhs eighty one thousand four hundred and thirty one only).
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> 3. Sterling agree to pay another sum of Rs.1,20,00,000/- (Rupees one crore twenty lakhs only) towards royalty and management fee for the period 1.4.2006 to 31.3.2007.
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> 4. Sterling have agreed to pay the balance of Rs.3,29,81,431/- (Rupees three crores twenty nine lakhs eighty one thousand and

four hundred and thirty one only) as per Annexure A in the following manner:-

ANNEXURE A

I	Amount due as per agreement dated 14.4.2005	28,500,000.00	
II	Management fee upto March 2006	3,400,288.00	
III	Royalty fee upto March 2006	1,581,143.00	
		33,481,431.00	
	Less amount paid till 24.2.2006	12,500,000.00	20,381,431.00
IV	Royalty fee for the period April 2006 to March 2007	8,000,000.00	8,000,000.00
V	Management Fee for the period April 2006 to March 2007	4,000,000.00	4,000,000.00
	Total amount payable as on 24.2.2006		32,981,431.00
	Less amount adjusted against Kanyakumari property		25,000,000.00
	Less amount payable as on 31st March 2006 (will be apid before 30..2006)		7,981,431.00
			1,981,431.00
	Amount payable before 31st march 2007		8,000,000.00

6.3 From the above, settlement terms between the parties, it is seen that out of the total consideration to be paid by SHRIL to appellant an amount of Rs.2.50 crores was agreed between the parties to be paid by transferring immovable property situated at Kanyakumari. The department has sought to demand service tax upon this amount of Rs.2.50 crores which is contested by the appellant in this appeal. During the disputed period, Section 67 of Finance Act, 1994 read as under:-

*"**Valuation of taxable service for charging service tax** –*

For the purpose of this chapter the value of any taxable service shall be the gross amount charged by the service provider of such service provided or to be provided. By him.

xxxx xxxxx xxxxx xxxxx xxxxx

Explanation. – For the purposes of this section, –

(a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;

(b) "money" includes any currency, cheque, promissory note, letter of credit, draft pay order, travellers cheque, money

order, postal remittance and other similar instruments but does not include currency that is held for its numismatic value.

(c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise".

6.4 Later with effect from 18.4.2006, the said section underwent amendment which reads as under:-

"SECTION 67.Valuation of taxable services for charging service tax

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, – (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him; (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration; (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner. (2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged."

6.5 Thus, after 18.4.2006, it can be seen that even if consideration is received as kind or other than money, the value of such kind other than money is also subject to levy of service tax. The value of any immovable property received as consideration would be subject to levy of service tax after 18.4.2006. In the present case, the appellants have received consideration in the nature of money as well as in the nature of immovable property. They paid up the service tax on the consideration received in the form of money. Even if the value of the immovable property is shown in the books of accounts in terms of money, it will not change the nature of the consideration received. The amendment brought forth with effect from 18.4.2006 makes it clear that prior to this date there was no intention to levy service tax on consideration received in the nature other than money. The show cause notice has relied upon the amended provision of Section 67 which would not be applicable on the date when the settlement took place.

6.6 According to the department since as per the settlement, the amount is for the period April 2006 to March 2007 part of the consideration which is in the nature of immovable property is for the service provided upto March 2007 (which is after 18.4.2006) and therefore the amended proviso to Section 67 would apply. It must be understood that the parties have entered into a settlement on 1.3.2006 so as to terminate the agreement dated 14.4.2005. After 1.3.2006, there is no provision of service by the appellant to SHRIL. In the final settlement agreement, it is seen that parties have derived the final amount to be paid by arriving at the quantum for different periods. For example, royalty fee upto March 2006, royalty fee for the period from April 2006 to March 2007, management fee for the period April 2006 to March 2007 etc. These periods mentioned in Annexure A of the agreement does not indicate that the appellant has provided services from April 2006 to

March 2007 or royalty fee was paid from April 2006 to March 2007. The periods mentioned in the said final settlement is only for the purpose quantification of the final settlement amount. The conclusion of the Commissioner that the amount settled by way of selling the immovable property is for the services provided for the period from 1.4.2006 to 31.3.2007 is incorrect. After the final settlement, undisputedly there has been no service provided by the appellant to SHRIL. Though part payments might have been received, such payments including the immovable property is for the services provided (or settled) upto 1.3.2006. It is also to be mentioned that prior to 2011, the service tax has to be discharged on receipt basis and not accrual basis. Though balance payments in the nature of money was received after 1.3.2006, the appellant is liable to pay service tax on such amounts since even prior to 18.4.2006 the consideration in money is taxable. For the immovable property received after 1.3.2006, there can be no levy of service tax since the provision of service is complete on 1.3.2006. At the cost of repetition, it is to be stated that the period shown in the final settlement agreement can only be in the nature of quantifying the amount by which the parties have been able to reach the final settlement. The consideration in the nature of immovable property is for the services provided prior to 1.3.2006.

6.7 The Board vide Letter No. 334/4/2006-TRU dated 28.2.2006, in para 8(1)(f) has clarified that the amendment to Section 67 proposes to include consideration received not wholly in terms of money. The same reads as under:-

> *"Substitute the existing section 67 with a new section67 to provide for determination of value of taxable service. At present, service tax is charged on the gross amount received. The proposed section provides determination of taxable value in cases where the consideration received for taxable services provided is not wholly in money terms and the consideration received is in money terms but not known explicitly. Separate valuation rules are proposed for this purpose".*

6.8 In Vistar Construction (P) Ltd. Vs. Union of India reported in 2013 (31) STR 129(Del.), the Hon'ble High Court of Delhi held that taxable event for service tax was rendition of service and that rate of tax applicable is the one on date on which services were rendered and not the rate on which payments were received. Since the amended Section 67 has come into effect only with effect from 18.4.2006, the immovable property which is part of consideration of Settlement Agreement dated 1.3.2006 would not be subject to levy of service tax.

7. For these reasons, we hold that the demand of service tax on the value of immovable property to the tune of Rs.30,60,000/- with the penalties thereon cannot sustain and requires to be set aside which we hereby do. As the assessee is not contesting the demand of service tax of Rs.33,53,890/- with interest thereon, no interference is made in respect of this demand. However, from the show cause notice itself it is clear

that the amount with interest has been paid on 21.3.2008 well before issue of show cause notice. Further, appellants have reflected their receipts in their accounts and it was only a matter of belated payment. We therefore find that it is a fit case for invoking section 80 to set aside the penalties imposed on this score also. Accordingly, the total penalty of Rs.75 lakhs imposed under section78 is set aside. So ordered. The impugned order is modified to the extent of setting aside the demand of Rs.30,60,000/- in respect of the value of the property only without disturbing the rest of the demand of the service tax. The appeal is partly allowed in the above terms, with consequential relief, if any.

(Pronounced in court on 18.02.2019)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

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