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

ST/40945/2014

(Arising out of Order-in-Original No. 08/2014 (ST) dated 11.03.2014 passed by the Commissioner of Central Excise, Chennai).

M/s. Lemon Tree Hotels Pvt. Ltd. : Appellant

Vs.

CST, Chennai : Respondent

Appearance

Shri Anil Sood, Advocate
for the appellant

Shri K. P. Muralidharan, AC (AR)
for the Respondent.

CORAM:

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

Date of Hearing/Decision: **28.11.2017**

FINAL ORDER No. 43404**/2017**

Per Bench

The appellants are running a 4 star hotel and are registered with the Service Tax department w.e.f. 22.05.2008. SCN was issued interalia alleging wrong availment of credit to the tune of Rs.77,02,444/- and wrong availment of abatement under Notification No. 1/2006-ST dated 01.03.2006 to the tune of

Rs.93,67,353/-. After due process of law, the original authority confirmed the demand, interest and imposed penalties. Aggrieved, the appellants are now before the Tribunal.

2. On behalf of the appellant, the Ld. Counsel, Shri Anil Sood submitted the following arguments which are summarized as under:-

i) The appellant commenced the running of the hotel w.e.f. February 2009. For the construction of the hotel building, the appellant availed various input services such as that rendered by civil contractors, architects and project management services. They availed credit of the service tax paid on these services. They had obtained service tax registration under the category of Cab operator's service, Health club and fitness service, Internet café service and Dry cleaning service etc., w.e.f. 22.05.2008. That, appellants were rendering the above taxable services w.e.f. 22.0-5.2008 and started rendering hotel services/Short term accommodation services and Restaurant services w.e.f. February 2009. Out of the above taxable services, the short term accommodation service and restaurant service became taxable only w.e.f. 01.05.2011. Thus, for the disputed period 2008 -09 to 2011-12 the appellant was rendering both taxable and non-taxable services. The allegation of the department that the appellant has wrongly availed Cenvat credit on Construction services is in correct.

ii) Rule 6 (5) provides that an assessee can avail input service credit of common input services if they are not exclusively used for exempted services. For example:- the Project management service, architect service etc., availed by the appellant are specified services in Rule 6 (5) of Cenvat Credit Rules (CCR in short). The said Rule states that when input services are not used exclusively for exempted services, notwithstanding anything contained in Rule 6 (1), (2) and (3), the credit is eligible on the services specified in the said Rule. Thus, the appellants have rightly availed the credit since the input services were not exclusively used for short term accommodation service or restaurant service which were not taxable services prior to 01.05.2011. The appellant was providing taxable services of Cab operator's service, Health club and fitness center service, Internet cab service and Dry cleaning service. Thus, applying the provisions in Rule 6 (5) for the relevant period, the appellant has rightly availed the credit. It is also submitted by the Ld. Counsel that w.e.f 01.04.2011 Rule 6 (5) came to be omitted vide Notification No. 3/2011.

iii) The second issue is the demand raised on account of availment of Notification No. 1/2006-ST dated 01.03.2006, during the period May 2011 to March 2012, the said notification provides for abatement in the case of services specified in the said Notification. One of the conditions to be fulfilled to be eligible for the abatement is that the appellant cannot avail Cenvat credit of duty on inputs or capital goods or Cenvat credit of service tax on input services used for providing such taxable service. The allegation of the department is that since the appellant has availed cenvat credit of input services, they are not eligible for abatement. It is explained by the Ld. Counsel that the condition in the Notification is that the credit on input services used for providing the output services specified in the Notification are restricted. It was only later by amendment dated 25.04.2011, the Hotel services/Short term accommodation services and Restaurant services came to be included in the above said Notification. The appellant had already availed credit on input services [16 specified services as provided under Rule 6 (5)] and had accumulated credit. That later Short term accommodation service and Restaurant service came to be included as specified services w.e.f. 25.04.2011. The Notification uses the words 'said taxable service' and 'such taxable service'. The restriction is imposed on availment and utilisation with regard to the services mentioned in Notification only. It does not impose any condition that the service provider shall not avail Cenvat credit on any of the services procured for providing all other output services. That the department has denied the credit as well as abatement on wrong interpretation of the said notification.

iv) To support his contentions, he relied upon the decisions laid down by the Tribunal as under:-

a) *Tidel Park Ltd. Vs. CST, Chennai*
2010 (18) STR 642 (Tri.-Chen.)

b) *CCE, Goa Vs. Asia Pacific Hotels Ltd.*
2013- TIOL-1078-CESTAT-Mumbai

c) *CCE, Goa Vs. V.M. Salgoankar Bros.*
2008 (10) STR 609 (Tri.-Mum.)

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The Ld. Counsel submitted that in the appellant's own case *M/s. Lemon Tree Hotel (Cybel Hill Developers Pvt Ltd., M/s. Fleur Hotels Pvt. Ltd. Vs. CC & CE, Hyderabad* – 2017 (7) TMI-CESTAT-HYDERABAD), the Tribunal on similar issue had decided in favour of the appellants. That the Commissioner (Appeals) for a different period had allowed the credit as well as abatement in the appellant's own case, which was considered by the Pune Commissionerate. That the decision in the case of *Bharat Heavy Electricals Ltd. Vs. CCE, Nagpur* – 2014 (34) STR 430 (Tri.-Mum.) was relied upon by the Commissioner (Appeals).

v) With regard to the demand of Rs. 67,075/- on Convention services, Ld. Counsel submitted that the appellant is not contesting the said demand.

3.1 Against this, the Ld. AR, Shri K.P. Muralidharan reiterated the findings in the impugned order. He adverted to para 14.16 to 14.18 of the impugned order and submitted that the appellant is attempting to mix up two issues which are mutually exclusive. One demand pertains to wrong availment of cenvat credit which is raised for the reason that the appellant has availed input services credit for both taxable and exempted services and therefore is not eligible for the credit. The second demand is with regard to wrong availment of abatement under Notification No. 1/2006-ST. As per Rule 6 (1) of CCR, the appellant cannot avail input service tax credit in respect of exempted services. Since the short term accommodation services and restaurant services were not taxable till 01.05.2011, these services have to be regarded as exempted

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output services. Rule 6 provides that service provider cannot avail input credit in case such input services are used for both taxable as well as exempted services unless, the procedures laid in 6 (2) (3) are complied. The appellants have not followed any of the condition in the said Rule. Therefore, the authorities below have rightly disallowed the credit availed on exempted services by the appellants.

3.2 While discharging the service tax on output services of Short term accommodation services and restaurant services, the appellant has availed abatement under Notification No. 1/2006-ST. One of the condition stated therein for availing the benefit of notification is that the assessee shall not take Cenvat credit on inputs, capital goods or input services. Since the appellants have availed credit on input services, they are not eligible for abatement. Therefore, the service tax paid by them by availing abatement is incorrect and the demand raised for the differential amount of service tax on this ground is legal and proper.

4. Heard both sides.

5.1 The first issue is with regard to wrong availment of Cenvat credit. It is brought out from the records that the appellants were rendering taxable services of cab operator's service, health club and fitness centre service, internet café service and dry cleaning service. The input service credit was availed by appellant on construction services which were used for setting up of the premises from where the output services were rendered by the appellant. The department does not have a case that the above services were not rendered from the building constructed by the appellant for which the credit on construction activities was availed. Rule 6 (5) as it stood during the relevant period states that credit is eligible on the services specified therein, if such services are not used exclusively ~~used~~ for exempted services. Even if we consider that prior to 01.05.2011, the output services of short term accommodation services and restaurant services were not taxable services, the appellants were rendering other taxable services like health club and fitness service, internet café service etc. Since the services specified in Rule 6 (5) were not used by the appellant exclusively for non-taxable services, the appellants are eligible for the credit. The said Rule starts with a non-obstante clause wherein it is stated that notwithstanding anything contained in Rule 6 (1), (2) and(3), the assessee will be eligible for credit on input services specified therein when it is not exclusively used for exempted services. The said Rule was omitted w.e.f. 01.04.2011. The credit is eligible on application of Rule 6 (5) of CCR, 2004. The decision in the case of Asia Pacific Hotels Ltd. (supra) explains the same. The relevant portion is reproduced as under:-

> "6. We have carefully considered the submissions made by both the sides. The purpose and objective of Cenvat Credit Rules is to allow a manufacturer/output service provider not only to take the credit but also to utilise the same for the purposes specified in the said Rules. The respondents herein are output service providers who discharge service tax liability. Therefore, if they are allowed only to take credit and not to utilise the same, the objective of the Cenvat Credit Rules cannot be achieved.

There is no reason for interpreting the term "allow" in a narrow and restrictive manner as urged by the Revenue. The said interpretation urged by the Revenue defeats the object and purpose of the Cenvat Credit Rules. Rules cannot be interpreted in such a way so as to make them nullity.

5.2 Similar view was taken by the Tribunal in the case of Tidel Park Ltd. (supra), the relevant portion of the decision is reproduced as under:-

"**2.** I have heard both sides and find merit in the submission of the assessees that they are entitled to the whole of the credit of the service tax paid on taxable service as specified in 17 specified categories covered by Rule 6(5) as such service is not used exclusively in or in relation to the providing of exempted services. Rule 6(5) is a *non obstante* clause and therefore completely widens the restriction contained in Rule 6(3)(c). It is not the case of the Revenue that the taxable service on which service tax has been paid is not one of 17 categories specified in Rule 6(5) of Cenvat Credit Rules, 2004. I, therefore, set aside the impugned order by accepting that the assessees are entitled to entire credit, and allow the appeal with consequential relief due to the appellants in accordance with law."

5.3 The second issue for consideration is the eligibility of abatement under Notification No. 1/2006-ST. The Ld. Counsel for the appellant has much stressed on the words " such services" in the condition stated under the said Notification". The condition is reproduced as under:-

"Provided that this notification shall not apply in cases where,-

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(i) the Cenvat credit of duty on inputs or capital goods or the Cenvat credit of service tax on input services used for providing such taxable service, has been taken under the provisions of the Cenvat Credit Rules, 2004;"

5.4 We find merit in this argument. During the disputed period (March 2011 -2012 for this demand) the appellant has not availed any credit of input services used for providing Short term accommodation services and Restaurant services. The credit already availed in 2009 was used to discharge the service tax liability. The Notification No. 1/2006-ST does not say that assessee cannot avail any credit at all. The condition is that the abatement would be available only if input service credit is not availed on input services used for providing such services specified in column 2 of the notification. In the appellant's own case reported as 2017 (7) TMI 799 (CESTAT-Hyderabad), the co-ordinate Bench of the Tribunal at Hyderabad had considered the very same issue on identical facts by relying upon the judgment of the Hon'ble High Court of Gujarat in the case of *Mundra Ports and Special Economic Zone Ltd. Vs. CCE* – 2015 (39) STR 726 (Guj.) and held as under:-

> "7. It is undisputed that the services are utilized for brining to existence building which is used by the appellants for hospitability business and is used for rendering output services like mandap keeper and health club and fitness centre and dry cleaning service and internet cafe services. It is an unimaginable that a hotel can render these services without a building in its place. In our considered view, the input services

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are availed by the appellant in respect of Works Contract Services, Project Management Services and Architectural Professional Services used for construction of a building, which subsequently is put into use for rendering taxable output services. We find that the adjudicating authority was in error to rely upon the Board Circular No. 98/1/2008-ST dated 04.01.2008 in as much, the definition of input services during the relevant period does not bar availment of CENVAT credit all input services. In order to appreciate correct position of law, the definition of input services under Rule 2(l) of the CENVAT Credit Rules, 2004 as was during the relevant period of these cases is reproduced:

input service means any service,-

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upt9o the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal.

It can be seen from the above reproduced Sub rule, that input services includes the services used in relation to settingup, modernization, renovation of premises of provider of output services. In the case in hand, the definition is reproduced as above categorically will apply and the clarification given by the Board in CBEC Circular dated 04.01.2008 is going beyond the definition as reproduced is herein above. We find that similar issue as to eligibility to avail the CENVAT credit on design and engineering of pipe line, services rendered by the pipeline laying of contractors, was denied in the case of Reliance Gas Transportation Infrastructure Ltd., (supra), holding that these services were utilized for brining into existence an immovable property. The Bench after considering the definition of input services, held that the provisions of Section 2(l) of the CENVAT Credit Rules, 2004 very clearly indicate eligibility to avail CENVAT credit of the service tax paid on these services.

8. Views of the Tribunal have been fortified by decision of the Honble High Court of Gujarat in the case of Mundra Ports and Special Economic Zone Ltd., (supra) the ratio is in paragraph No. 7, 8 & 9 which we with respect reproduce:-

> 7. It is not disputed that jetty was constructed and input credit was claimed on cement and steel. The aforesaid definition of Rule 2(k) was applicable and Explanation 2 did not provide that cement and steel would not be eligible for input credit. According to learned Counsel for the appellant, the appellant is not manufacturer and, therefore, the provisions of Explanation 2 of Rule 2(k) would be applicable only to the factory and manufacturer. The appellant is neither having any factory nor he is manufacturer. The appellant is a service provider of port. We need not go into this question as to whether the appellant is a factory or manufacturer or service provider in view of the fact that it is not disputed by Mr. Y.N. Ravani, learned counsel appearing for the Revenue in this Tax Appeal that the appellant provides service on port for which he is getting jetty constructed through the contractor and the appellant has claimed input credit on cement and steel. The cement and steel were not included in Explanation 2 from 2004 up to March, 2006. The Cenvat Credit Rules, 2004 were amended in exercise of the powers conferred by Section 37 of

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the Central Excise Act, 1944 with effect from 7-7-2009, the date on which it was notified by the Central Government from the date of the notification. According to learned Counsel for the appellant, this amended definition would apply only to the factory or manufacturer and would not apply to the service provider. According to him, either before the amendment made in the year 2009 or thereafter, the appellant was neither factory nor manufacturer and he has only constructed jetty by use of cement and steel for which he was entitled for input credit as jetty was constructed by the contractor, but the jetty is situated within the port area and the appellant is a service provider. According to the appellant, his case is squarely covered by the judgment of the Division Bench of the Andhra Pradesh High Court in Commissioner of Central Excise, Visakhapatnam-II v. Sai Sahmita Storages (P) Limited, 2011 (270) E.L.T. 33 (A.P.) = 2011 (23) S.T.R. 341 (A.P.) wherein in Paragraph 7, it has been clearly held that a plain reading of the definition of Rule 2(k) would demonstrate that all the goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable service for providing an output service are eligible for Cenvat credit. It is not in dispute that the appellant is a taxable service provider on port under the category of port services. Therefore, the appellant was entitled for input credit and the decision of the Division Bench of the Andhra Pradesh High Court squarely applies to the facts of the case and answered the question on which the appeal has been admitted.

8.Mr. Y.N. Ravani, learned counsel for the Revenue has placed reliance on the decision of the Larger Bench of the Tribunal in Vandana Global Limited v. Commissioner of Central Excise, Raipur, 2010 (253) E.L.T. 440. We have carefully gone through the decision of the Larger Bench of the Tribunal. We do not find that amendment made in Cenvat Credit Rules, 2004 which come into force on 7-7-2009 was clarificatory

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amendment as there is nothing to suggest in the Amending Act that amendment made in Explanation 2 was clarificatory in nature. Wherever the Legislature wants to clarify the provision, it clearly mentions intention in the notification itself and seeks to clarify existing provision. Even, if the new provision is added then it will be new amendment and cannot be treated to be clarification of particular thing or goods and/or input and as such, the amendment could operate only prospectively. In our opinion, the view taken by the Tribunal is based on conjectures and surmises as the Larger Bench of the Tribunal used the expression that intention behind amendment was to clarify. The coverage under the input from where this intention has been gathered by the Tribunal has not been mentioned in the judgment. There is no material to support that there was any legislative intent to clarify any existing provision. For the same reason, as mentioned above, the decision of the Apex Court in Sangam Spinners Limited v. Union of India and Others, reported in (2011) 11 SCC 408 = 2011 (266) E.L.T. 145 (S.C.) would not be applicable to the facts of the instant case.

9. Mr. Ravani has also vehemently urged that since jetty was constructed by the appellant through the contractor and construction of jetty is exempted and, therefore, input credit would not be available to the appellant as construction of jetty is exempted service. The argument though attractive cannot be accepted. The jetty is constructed by the appellant by purchasing iron, cement, grid, etc., which are used in construction of jetty. The contractor has constructed jetty. There are two methods, one is that the appellant would have given entire contract to the contractor for making jetty by giving material on his end and then make the payment, the other method was that the appellant would have provided material to the contractor and labour contract would have been given. The appellant claims that he has provided cement,

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steel, etc., for which he was entitled for input credit and, therefore, in our opinion, the appellant was entitled for input credit and it cannot be treated that since construction of jetty was exempted, the appellant would not be entitled for input credit. The view taken contrary by the Tribunal deserves to be set aside.

It can be seen from the above reproduced paragraphs of the judgment of the Honble High Court of Gujarat the issue avaliment of CENVAT credit on the input services which are used for brining into existence of immovable property are also eligible for availment of CENVAT credit."

5.5 In the case of Bharat Heavy Electrical Ltd. Vs. CCE, Nagpur – 2014 (34) STR 430 (Tri.-Mum.), the Tribunal had occasion to analyse a similar issue with regard to availability of abatement under the Notification No. 1/2006-ST. The Tribunal observed as under:-

"**4.2** A plain reading of the Notifications clearly shows that the condition relating to non-availment of CENVAT credit on inputs/input services applies to "case" where CENVAT credit is taken either on the 'input' or 'input service', then the abatement under the aforesaid Notifications would not be available. In a "case" where the CENVAT credit on input/input service is not taken then the benefit of abatement would be available. The Notification uses the expression "in cases where". In other words, the Notification does not stipulate that in all cases, the condition of non-availment of CENVAT credit should be satisfied uniformly without exception. Therefore, in respect of a contract where the assessee has not taken input credit prior to 1-3-2006 and input/input service tax credit on or after 1-3-2006, the assessee would be rightly entitled for the benefit under the Notification No. 15/2004-S.T. as replaced by Notification

No. 1/2006, dated 1-3-2006. In a case where the assessee avails CENVAT credit, then in such cases the assessee is not entitled for abatement and the service tax liability will have to be discharged on the full value of the contract. There is nothing in these Notifications which prevents an assessee from not availing CENVAT credit and paying service tax on 100% of the contract value in respect of one particular contract and availing abatement and not availing CENVAT credit in respect of another contract. In other words, there is no stipulation in the Notification that the option to avail/non-avail CENVAT credit has to be exercised uniformly in respect of all the contracts executed by the assessee. It is for the assessee to choose which formulation he wants to follow in a given contract.

4.4 The next issue for consideration is in a case/contract where abatement benefit is availed under Notification 15/2004 or 1/2006, without taking CENVAT credit on inputs or capital goods or input service and service tax liability is discharged on the reduced value, whether for the purpose of discharge of service tax liability, accumulated CENVAT credit arising from some other case/contract can be utilised or not. In our view, there is no such bar or restriction/prescribed in the notification. The notification only stipulates that in respect of a case/contract, where abatement is availed, no CENVAT credit on inputs, capital goods or input services shall be taken. So long as this condition is satisfied, abatement is permissible. Discharge of service tax liability on the non-abated portion of value is a totally different matter. Hence there is no bar/restriction in discharging service tax liability through accumulated CENVAT credit so long as no CENVAT credit is taken on the inputs/capital goods or input services used in the rendering of the service in the given case or contract and we hold accordingly."

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6. Following the above decisions and after considering the facts and evidences presented before us, we hold that the demand raised in respect of wrong availment of credit and wrong availment of abatement cannot sustain. The impugned order to the extent of demand raised on these issues is set aside without disturbing the demand of service tax on Convention services. The appeal is allowed in above terms.

(Operative part of the Order pronounced in the open Court on 28.11.2017)

Sulekha Beevi

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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प्रमाणित प्रति / CERTIFIED TRUE COPY
K. S. Ramesh
01/02/18
सहायक पंजीकार / Assistant Registrar
सीमा शुल्क, उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण,
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