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

**COURT HALL No.III**

## SERVICE TAX APPEAL No. 40737 OF 2014

(Arising out of Order-in-Original No.CHN-SVTAD-000-COM-045-13-14 dated 22.01.2014 passed by Commissioner of Service Tax, Newry Towers – I, II Avenue, Anna Nagar, Chennai 600 040)

**M/s.Spencer International Hotels Ltd. ... Appellant**
2B, Queens Court, 2nd Floor,
98-145, Montieth Road,
Egmore,
Chennai 600 008

Versus

**The Commissioner of GST & Central Excise ...Respondent**
Chennai North Commissionerate,
No.26/1, Mahathma Gandhi Road,
Nungambakkam,
Chennai 600 034

**AND**

## SERVICE TAX APPEAL No.41552 OF 2017

(Arising out of Order-in-Appeal No.223/2017 (STA-1) dated 27.04.2017 passed by Commissioner of Service Tax (Appeals-I), Newry Towers, 3rd Floor, Plot No.2054,I Block, II Avenue, Anna Nagar, Chennai 600 040)

**M/s.Spencer International Hotels Ltd. ... Appellant**
2B, Queens Court, 2nd Floor,
98-145, Montieth Road,
Egmore,
Chennai 600 008.

Versus

**The Commissioner of GST & Central Excise ... Respondent**
Chennai North Commissionerate,
No.26/1, Mahathma Gandhi Road,
Nungambakkam,
Chennai 600 034.

**APPEARANCE :** .

Ms. Manasi Patil, Advocate
Mr. Siddharth Sriram, Advocate
For the Appellant

Mr. R. Rajaraman, Assistant Commissioner (A.R)
For the Respondent

**CORAM :**

**Hon'ble Ms. SULEKHA BEEVI, Member (Judicial)**
**Hon'ble Mr. M. AJIT KUMAR, Member (Technical)**

**DATE OF HEARING : 19.06.2023**

**DATE OF DECISION :22.06.2023**

**FINAL ORDER No.40461-40462/2023**

**ORDER : Per Ms. Sulekha Beevi, C.S.**

The issue involved in both these appeals being the same, they were heard together and disposed of by this common order.

2. Brief facts are that the appellant, M/s.Spencer International Hotels Ltd. is engaged in the business of running hotels and is also licensee of three hotels namely West End Hotel at Bangalore in the State of Karnataka, Connemara Hotel at Madras and Savoy Hotel at Ooty, both in the State of Tamil Nadu. These three hotel properties were earlier run as hotels by M/s.Spencer and Company Ltd. for more than 100 years. Later on, as part of business restructuring, these three hotels were transferred on a Going Concern basis to the appellant in June 1978 vide Business Transfer Agreement dated 28.06.1978. Intelligence was gathered that the appellant is providing taxable service and has not registered themselves nor paid

any service tax for service rendered under the category of 'Renting of Immovable Property Service'. On investigation, it revealed that an agreement was entered into by the appellant with M/s. International Hotels Company Ltd. (IHCL, for short) dated 20.03.1984. In the said agreement, the appellant ganted licence to M/s.IHCL to run, conduct and operate the above three hotels together with all the related facilities and business appertaining thereto from the date of execution of the agreement. As per the agreement, the license was initially termed for 25 years. The licence fee fixed was equivalent to a percentage of the annual sales from the operation of the said three hotels. It appeared to the department that the appellant is receiving rent from M/s.IHCL for renting out immovable property (hotels) to M/s.IHCL. Appellant had not discharged service tax for the period 01.06.2007 to 31.03.2011. Show cause notice dated 19.10.2012 was issued to the appellant proposing to demand the service tax along with interest and also for imposing penalties. After due process of law, the original authority vide Order-in-Original dated 22.01.2014 confirmed the demand, interest and imposed penalty. Aggrieved by the order of original authority, the appellant has filed Appeal ST/40737/2014.

3. Subsequent to the aforesaid OIO dated 22.01.2014, a Statement of Demand No.25/2014 dated 03.04.2014 was issued to demand service tax along with interest and also to impose penalty for the period 01.04.2012 to 30.06.2012 indicating that allegations made in the earlier SCN dt. 19.10.2012 shall form part of this SOD also. Upon adjudication, the original authority vide OIO dated

05.02.2016 confirmed the demand, interest and penalty. On appeal, the Commissioner (Appeals) vide OIA dated 27.04.2017 upheld the order of original authority. Aggrieved by this impugned order, appellant has filed Appeal ST/41552/2017.

4. Ld. Counsel Ms. Manasi Patil along with Sri Siddharth Sriram, Advocate appeared and argued for the appellant. It is submitted that appellant, M/s.Spencer International Hotels Ltd., are the owners of three hotels known as West End Hotel at Bangalore which is situated in the State of Karnataka; Connemara Hotel at Chennai and Savoy Hotel at Ooty both of which are situated in Tamil Nadu. These hotels were run by M/s.Spencer and Company Ltd. and later, as part of business restructuring transferred these three hotels on a growing concern basis to the appellant viz. M/s.Spencer International Hotels Ltd. Subsequently, the appellant conducted hotel business from 1978 till 1984. A Joint Venture Agreement was entered by appellant with M/s.Indian Hotels Company Ltd. (IHCL). Ld. Counsel pointed out that so far as the Connemara Hotel at Chennai is concerned, the undertaking has been demerged from the appellant company and transferred to M/s. Grand Royal Enterprises Ltd. w.e.f 01.04.2009 as per the order of the Hon'ble High Court of Madras.

5. The agreement entered between the appellant and M/s.IHCL was in the nature of business conducting agreement which permits / allows IHCL to conduct the entire business of running the said hotels. As per the agreement with IHCL i.e. the Joint Venture Agreement, IHCL has a duty cast on it to return the three hotels in

fully functional / operational condition at the end of the Licence Agreement, as per Clause 15.1 (n) and Clause 8.3.

6. It is asserted by the Ld. Counsel that main object of the agreement is to assign entire business of the aforesaid hotels to IHCL and it is not for renting immovable property. This fact that the object of the agreement is to assign the entire hotel business to IHCL gets substantiated from the fact that licence fees is received by the assessee as a percentage of Annual Sales. The arrangement cannot be treated as 'Renting of Immovable Property'.

7. The transaction is of sharing of business profits and not renting of immovable property. If it was mere renting of the immovable property, the rent charged in whatever form would be fixed, and not variable and would never be in the form of percentage of the business profits.

8. As per the agreement, M/s.IHCL has been permitted to use the hotel property. The act of giving hotel property to operate and run the hotel is incidental to the assigning of running the entire hotel business. The agreement is for assigning the entire hotel business for conducting of the same and permitting the usage of property is only incidental, which cannot be taxed separately.

9. Ld. Counsel argued that the intention of the agreement cannot be deciphered from one of the Article / Section / Clauses of the agreement. Substance of the activity and the intention of the parties has to be looked into to arrive at the conclusion as to the nature of the agreement. Further, the licence agreement is a single indivisible

agreement which grants to IHCL the licence to run, operate and conduct the hotel and also permits IHCL to use the immovable property of the hotel. For this purpose, IHCL pays a composite licence fee to the appellant in the form of a percentage of the Annual Sales. It is impossible to ascertain what part of it is attributable to the use of the immovable property as distinct from the grant of licence to operate and run the said hotels. The very nature of things, the use of property and grant of licence to conduct are inseparable and there is no machinery or provision under the Finance Act, 1994 to determine the amount attributable to the user of the property as distinct from the grant of licence to conduct the hotel. In such circumstances, the charge of service tax cannot sustain.

10. Alternatively, it was argued by the Counsel that even if it is assumed that by giving the entire hotels for conducting, the appellant has permitted the usage of the immovable property, the predominant value would be for licencing to run the entire hotels business. It is the settled position of law that there is when there is dispute of classification, the predominant value would be one of the criteria for classification.

11. Under the Finance Act, 1994, the charging Section i.e. Section 66 and the computation provision i.e. Section 66 read with Valuation Rules, constitute an integrated code. Thus, if under Section 67 read with Valuation Rules it is not possible to compute /ascertain the value attributable to user of the property, then the charging provision [Section 66] itself would fail. The amount received by the appellant is neither in the nature of a fixed rent nor is it a consideration for

any service provided by them to IHCL. The licence fee is the amount agreed between the parties to be paid for sharing mutual benefits / profits between themselves.

12. Even if it is assumed that the appellant has rented the hotel property to IHCL, in view of the specific exclusion of 'buildings used for accommodation including hotels' under Explanation-1 to Section 65 (105) (zzzz), the same would not be taxable under 'Renting of Immovable Property Service'. The section deals with two categories of cases e.g. residential and non-residential accommodations. An explanation to the section which is limited in scope to one category namely, residential accommodations, cannot affect the scope of the section with reference to the second category viz. non-residential accommodations. It is submitted by the Ld. Counsel that while interpreting the scope of an explanation, it has to be seen that as to which clause the explanation would apply. Under Section 65 (105) (zzzz) in clause (d) of Explanation, buildings used for accommodation including hotels have specifically been excluded. It is relevant to note that this part of exclusion does not use the word 'solely', as, it is used in previous expression i.e. 'building used solely for residential purposes'.

13. The issue whether grant of licence to operate and run the entire hotel business would be covered under the category of taxable service viz. 'Renting of Immovable Property Service' is no more *res integra.* In the case of *Grand Royale Enterprises Vs CST Chennai* - 2019 (31) GSTL 453 (Tri.-Chennai) this Bench has relied upon various judgement and held that granting of licence to a hotel

company to run a hotel at an annual fee equivalent to certain percentage of turnover of the said hotel would not be liable to service tax as there is no 'fixed rent" as payable in a normal renting of immovable property. The Tribunal set aside the demand on the ground of limitation also. Against the Tribunal decision (supra) though Department filed Civil Appeal No.7326 of 2019 before the Hon'ble Supreme Court, the appeal was dismissed by the Hon'ble Apex Court vide its judgment dt. 01.12.2022 as reported in 2022 (63) G.S.T.L. 412 (S.C).

14. The clause of the agreement clearly indicates that appellant is getting specified percentage of business profits and therefore the decision of the Tribunal in the case of *Grand Royale Enterprises* would be squarely applicable. Ld. Counsel asserted that appellant and IHCL are business partners. Therefore, the appellant is not simply giving space on rental basis. The CBEC vide circular No.109/3/2009-ST 23.02.2009 has clarified that in cases of sharing of business profits, there cannot be any service provided by one person to another.

15. Ld. Counsel argued on the ground of revenue-neutrality also. Appellant would be eligible to avail credit of the service tax paid and being revenue-neutral situation, the demand confirmed is not correct.

16. Arguments were put forward by the Ld. Counsel on the ground of limitation also. It is submitted that the facts were known to the department as the copies of the agreement were furnished to the department vide letters dated 15.12.2005, 26.06.2005. Even then

show cause notice has been issued on 19.10.2012 invoking extended period of limitation alleging suppression of facts with intention to evade payment of service tax. There is no positive act of suppression brought out and that the issue is interpretational in nature.

17. Ld. A.R Sri R. Rajaraman appeared and argued for the Department. The appellants are owners of Hotel Connemara, Madras, Savay Hotel, Ooty and Westend Hotel, Bangalore. On 20.03.1984, they entered into an agreement with M/s.IHCL granting exclusive right to run, conduct and operate the same together with all the related facilities and business appertaining thereto from the date of execution of the agreement. The period of agreement initially was for 25 years extendable for further period of 25 years on the same terms and conditions. As per clause 3.1 of the agreement, M/s. IHCL has to deposit / pay to the appellant a sum of Rs.5 Crores. The said deposit will be interest-free and held as a security deposit by the appellant. Half of the security deposit has to be returned by appellant on or before the expiry period of 15 years. The balance deposit would continue as interest free deposit which would be refunded on the expiry of the period of the agreement or it's sooner determination as provided in the agreement. As per clause 4.1 of the agreement, M/s.IHCL has to pay licence fee to the appellant. The licence fee fixed is equivalent to 15% of the Annual Sales from the operations of the said three hotels. It is provided in the agreement that M/s.IHCL has to pay to appellant a minimum licence fee of Rs.120 lakhs per annum for the initial period of three years and a minimum licence fee of Rs.150 lakhs per annum from the

fourth year onwards during the subsistence of the agreement either during the initial period or during the subsequent extensions thereof. In clause 4.3 of the agreement, it is stipulated that for the purpose of the agreement the term "Sales" from the operations of the said three hotels shall be the total amount of income derived by M/s.IHCL from the said hotels as certified by the Statutory Auditors of M/s.IHCL. The meaning of the expression "Sales" is also stipulated in clause 4.3 of the agreement.

18. From the above, it is argued by the Ld. A.R that it can be seen that the agreement is not an agreement for sharing of profits but the rights to use the said properties and to run a hotel therein has been granted. It is expressly agreed between the appellant and M/s.IHCL that appellant shall not be liable or responsible in any manner for any debts and/or obligations of the hotel, so run, conducted, maintained and managed by M/s. IHCL. It is therefore clear that complete management, operations, administration and maintenance of the hotel is under the control of M/s.IHCL which has absolute discretion to run, conduct and operate the hotels.

19. When the agreement is seen in totality, it shows that transaction entered into by the appellant with M/s.IHCL is for leasing out the properties for running the business of hotels for a consideration which is calculated as a percentage of operational income. This has been further substantiated by the fact that the appellant has obtained Rs.5 crores as interest free deposit before handing over the property to M/s.IHCL and only half of it is to be returned at the end of the initial period of lease. Obtaining interest

free deposit as security against a property when the same is leased/rented and returning the deposit amount when the property is returned, is normal in transactions involving renting / leasing. Moreover, as per the terms of the agreement, appellant does not have a say in the day to day normal running of hotels. It is submitted by the Ld. A.R that the agreement proves that the appellant has leased out the property to M/s.IHCL for consideration and this forms the predominant character of the agreement. Ld.A.R prayed that the appeal may be dismissed.

20. Heard both sides.

21. The issue that arises for consideration is (i) whether the appellant is required to pay service tax under the head "Renting of Immovable Property Service" in terms of the agreement entered by the appellant with M/s.IHCL; (ii) whether the demand, interest and penalties are sustainable; (iii) whether show cause notice issued invoking the extended period is sustainable.

22. The period involved in appeal ST/40737/2014 is from 01.06.2007 to 31.03.2011. The period involved in appeal ST/41552/2017 is from 01.04.2012 to 30.06.2012. The dispute revolves around the agreement executed by the appellant with M/s.IHCL dated 20.03.1984. Relevant clauses of the agreement read as under :

> **"DEPOSIT** **3.1 IHC will deposit with SIHL a sum of Rs.5,00,00,000/- (Rupees Five Crores only) on or before the appointed date. The said deposit will be interest free and held as a security deposit. SIHL will refund half of the deposit amount i.e.**

**Rs.2,50,00,000/- (Rupees Two Crores Fifty Lakhs only) on or before the expiry of the period of 15 years from the appointed date. The balance of the deposit amount of Rs.2,50,00,000/- (Rupees Two Crores and Fifty Lakhs only) would continue as interest free deposit which would be refunded on the expiry of the period of the agreement or its sooner determination as provided herein.**

**LICENCE FEE** **4.1 In consideration of the licence hereby granted IHC shall pay to SIHL the following :**

**(a) the licence fee equivalent to 15% of the Annual Sales from the operations of the said Three Hotels till such time SIHL return half of the security deposit vis., Rs.2,50,00,000/- (Rupees two crores and fifty lacs only) in terms of clause 3 hereof.**

**(b) The licence fee equivalent to 20% of the Annual Sales from the operations of the said thee Hotels on and from the date on which SIHL returns to IHC half of the security deposit viz., Rs.2,50,00,000/- (Rupees two crores fifty lacs only) I terms of clause 3 herein above.**

**Provided HOWEVER that IHC shall pay to SIHL a minimum licence fee of Rs.120 lakhs per annum for the initial period of Three Years and a minimum licence fee of Rs.150 lakhs per annum from the fourth Year onwards during the subsistence of this Agreement either during the initial period or during the subsequent extensions thereof.**

**4.2 In case of future expansion of the said Three Hotels or any one or more of them the additional licence fee on the expanded facilities shall be charged and calculated and paid by IHC to SIHL in the manner provided herein.**

**4.3 For the purpose of this Agreement the term "Sales" from the operations of the said three hotels shall be the total amount of income derived by IHC from the said hotels as certified by the Statutory Auditors of IHC. The expression 'sales' shall mean and include the following :-**

**a) Room receipts from realization of room occupancy charges.**
**b) Sale of goods, beverages, drinks and smoking requisites from restaurants, bars, banquet rooms, dining halls, public rooms and other catering outlets like snack bars, pastry shops, coffee shops and charges on account of room services, and charges on account of use of public rooms, banquet rooms and charges on account of entertainment shows and outdoor catering organized by the said three Hotels or anyone or more of them**
**c) Income from commercial space on account of compensation and / or licence fees of shops, counters, shop-windows, show-cases or any premises given out to any person/parties.**
**d) Excess of recovery over the expenditure incurred in respect of telephone, telex charges, charges for laundry, T.V., Car hire, and other services.**
**e) Income from service charges, surcharges/additional charges, swimming pool, squash courts/and sports and recreation facilities, health club, income from valet services and hire charges and other miscellaneous income."**

23. The foremost argument put forward by the Ld. counsel for the appellant is that the amount received by the appellant from M/s.IHCL is not in the nature of rent received for permitting to use the immovable property and that it is in the nature of Joint Venture Agreement where both parties have agreed to share the profits in a

particular manner. On perusal of the licence fee, it is seen that it is fixed on the basis of the annual sales from the operations of the hotels. The term 'Sales' is explained in clause 4.3 of the agreement. These clauses show that amount received by the appellant is in the nature of sharing of profits and cannot be considered as 'rent' received for renting / licensing of the immovable property. On perusal of various clauses of the agreement, it cannot be said that the there is a predominant activity of renting of immovable property. The hotel along with its' premises, facilities, the goodwill etc. has been handed over to M/s.IHCL. The intention is therefore not to merely permit to use the space. Further the alleged consideration is based on the annual sales. The amount paid as security deposit is only to meet the risks at the initial stages. The decision in the case of *Grand Royale Enterprises* (supra) would be squarely applicable as the agreement and facts are identical and the demand for the period upto 31.03.2011 cannot sustain.

24. The period involved in ST/41552/2017 is partly after 01.06.2012 when major amendments were introduced in the Finance Act, 1994. Section 66B provides that 'there shall be levied tax (hereinafter referred to as the service tax) at the rate of fourteen percent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed'. Section 66D gives the negative list of services. Renting of Immovable Property is not included in the

negative but finds place in Section 66E which is Declared service. The definition of Renting of Immovable Property reads as under :

> **"**The renting of immovable property as defined in Section 65(90a) of the Finance Act includes renting, letting leasing, licensing or similar arrangements of immovable property. What is immovable property is defined in Section 65(105)(zzzz) ibid is as under :
>
> *"Explanation 1.* - For the purposes of this sub-clause, "immovable property" includes -
>
> (i) building and part of a building, and the land appurtenant thereto
>
> (ii) land incidental to the use of such building or part of a building;
>
> (iii) the common or shared areas and facilities relating thereto; and
>
> (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,
>
> (v) vacant land, given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce;
>
> but does not include -
>
> (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
>
> (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
>
> (c) land used for educational, sports, circus, entertainment and parking purposes; and
>
> (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.
>
> *Explanation 2* - For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce."

25. The question is whether the consideration received is for providing the taxable service of renting of immovable property. The Explanation to Section 67 (Valuation of taxable services for charging service tax) reads as under :

> "Explanation : for the purposes of this section —

(a) 'consideration' includes –

any amount that is payable for the taxable services provided or to be provided."

26. Again, Section 65B (44) defines "service" as under :

"Service" means any activity carried out by a person for another for consideration, and includes a declared service.

Though renting of immovable property per se is a declared service, we have to examine as to whether there is an element of service by way of renting as per the agreement. It needs also to be taken notice that Explanation 3 to Section 65B (44) states that :-

"For the purposes of this Chapter, —

(a) an un incorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons".

The above explanation would take in joint venture agreements where the activity provided by one person to another falls within the definition of 'service'. On examination of the agreement, it is in the nature of joint venture where both parties have come together to carry out the business on a revenue sharing model. Both parties are desirous of earning profit. Generally, while in the case of providing service one party is desirous of receiving service and the other party is desirous of receiving the consideration. It cannot be said that by providing the hotel premises for conduct of hotel business and receiving the share of profit, the appellant is providing renting of immovable property service. This is because when the entire hotel along with its' facilities are licensed to M/s.IHCL with an intention to

receive share of the profit of the business, the transaction is more in the nature of contributing to the capital of the joint venture.

27. The Tribunal in the case of *Inox Leisure Ltd. Vs CST, Hyderabad* – 2002 (60) GSTL 326 (Tri.-Hyd.) had occasion to analyse a revenue sharing agreement. The facts in the case are such that the appellant therein was engaged in the business of exhibiting cinematographic films across India in theatres owned by the appellant as well as taken on rent. The appellant acquired rights for exhibiting films from film distributors by entering into special license agreements for each film. The consideration for such license is paid as per the agreed percentage of box office collection and such percentage varies from distributor to distributor, movie to movie, week to week, after the release date. The department was of the view that appellant was providing services to the distributors / producers in the nature of infrastructure support services (BSS) as under section 65 (104c) of the Finance Act, 1994. The Tribunal held that a revenue sharing agreement by itself does not necessarily imply provision of service, unless service provider and service recipient relationship is established. As per para 4 of the said order of the Tribunal, the demands were raised for the period 09.05.2009 to 31.03.2012 and 01.04.2012 to 30.06.2012. The Tribunal set aside the demands for both the periods observing that the agreement did not bring out any service provider and service recipient relationship.

28. In the case of *Moti Talkies Vs Commissioner* - 2012 (45) GSTL 168 (Tri), the department raised the demand under the category of 'Renting of Immovable Property' on the agreement / arrangement

between distributor / producer and exhibitor of films. In the case of *Golcha Properties Pvt. Ltd. Vs Principal Commissioner of Service Tax* - 2021 (45) GSTL 141 (Tri.) the appellant therein had entered into agreements with films distributors under which the theatrical exhibition rights for exhibition of films was transferred to the appellant. The appellant agreed to share percentage of net box office collection with the distributors. The department was of the view that appellant was providing various elements of interconnected services to the distributors, such as renting / letting / leasing of theatre for exhibition of films, manpower to manage the theater operations etc. According to department, the essential character of service was renting of immovable property. The Tribunal set aside the demand for the period upto June 2012 as well as for the period 01.07.2012 to 31.03.2014. The Tribunal observed that the arrangement is on a revenue sharing basis and hence, no service tax is leviable.

28. The Tribunal in the case of *Grand Royal Enterprises* Vs CST Chennai - 2019 (31) GSTL 453 (Tri.-Chennai). Ld. Counsel pointed out that the facts are similar and the related hotels involved are also same. For better appreciation the facts are noted as under :

> "The facts of the case are that M/s. Green Royale Enterprises Ltd., the appellants herein, are engaged in the business of running hotels. The business assets of Hotel Connemara, Madras, Westend Hotel, Bangalore and Savoy Hotel, Ooty owned by Spenser & Co. were transferred at book cost to M/s. Spencer International Hotels Ltd. (SIHL) vide an agreement dated 28-6-1978, which also granted long term lease of the land of the said three hotels to the latter. In a subsequent agreement dated 20-3-1984, SHIL granted licence to M/s. International Hotels Company Limited (IHCL) to run, conduct and operate the above three hotels along with related facilities and business appertaining thereto for 25 years. M/s. IHCL deposited with "SIHL" a sum of Rs. 5 crores as interest free deposit of which the latter would refund an amount of Rs. 2.50 crores at the end of 15 years and the balance would be refunded on the expiry of

the agreement. As per para 4.1 of the agreement a consideration agreed was as under :

> "(a) The license fee equivalent to 15% of the Annual Sales from the operation of the said three hotels till such time SIHL return half of the security deposit i.e. 2.5 Crores.
>
> (b) The license fee equivalent to 20% of the Annual Sales from the operations of the said three hotels from the date on which SIHL return half of the security deposit i.e. 2.5 Crores :
>
> Provided, however, that IHCL shall pay to SIHL a minimum license fee of Rs. 120 Lakhs per annum for the initial period of three years and a minimum license fee of Rs.150 Lakhs per annum from the fourth year onwards."

Subsequently, Hotel Connemara undertaking was transferred to the appellant by way of demerger scheme approved by the Hon'ble Madras High Court vide order dated 27-2-2009. In consequence, the IHCL started paying license fee in respect of Connemara Hotel undertaking to appellant from 2009-10 onwards under the same conditions. As the "license fee" received by the appellant was based on a certain percentage of the income from operations of the hotel business, it appeared to the department that appellant has rented out the immovable property for conducting hotel and other related business for furtherance of business or commerce against license fee, hence the appellants are liable for payment of service tax under "Renting of Immovable Property Service" w.e.f. 1-6-2007. Accordingly, proceedings were initiated by issue of a SCN dated 17-3-2014 wherein *inter alia,* service tax liability of Rs. 3,21,94,224/- under the category of Renting of Immovable Property Service for the period 2009-10, 2011-12 and 2012-13 was proposed to be demanded with interest thereon. SCN also proposed imposition of penalties under Sections 76, 77 & 78 of the Finance Act, 1994. In adjudication, the Commissioner vide impugned order dated 9-3-2015 confirmed demand of Rs. 2,51,85,330/- with interest thereon, imposed equal penalty under Section 78 ibid and also imposed penalty under Section 77(1) and 77(2) ibid. Aggrieved the appellants are before this forum."

29. The Tribunal in the said decision held as under :

> **5.2** From an analysis of the above definitions, in our opinion, to fall within the taxable entry of "renting of immovable property", the immovable rented out should be the genre exemplified in Explanation 1 reproduced supra. In the present case, however, the agreement between the appellant and IHCL is not merely for renting of the hotel or land appurtenant thereto etc., but is "license to run, conduct and operate Connemara hotel together with all the related facilities and business appertaining thereto". It appears to reason that not just the immovable property portion of the hotel, but also, the employees and other staff, goodwill and other paraphernalia are also taken into consideration by the

two parties involved while framing the license agreement. It is also relevant to note that there is no "fixed rent" that is payable as would be expected in a normal renting of immovable property transaction. On the other hand, the consideration for license to run, conduct and operate the hotel is a "license fee" equivalent to 15%/20% of the annual sales from the operation of the hotels. This being so, the license fee that would accrue to the appellant is only a percentage of the turnover. Since the turnover is never static but is dynamic and will go up or down in every succeeding year, the "lease license fees" would also wax or wane in resonance. The license fees are accruing to the appellants therefore have an umbilical card relation with the turnover and profits of the hotel business under IHCL. In our view therefore, the transaction between the appellant and IHCL is definitely not one of "renting of immovable property" but a business transaction between the two, where the consideration is not like a regular rent but is dependent on the annual performance and profits of the hotel.

**5.3** We find that the same view has been reiterated in a number of Tribunal's decisions cited by the Ld. Advocate (supra).

**5.4** In *Jai Mahal Hotels Pvt. Ltd.* (supra), in a Bench presided over by the then President of CESTAT, in a case where the appellant had similarly leased its hotel to IHCL, the Tribunal held as under :

"9. In our considered view the above interpretation adopted by the Authorities below is fundamentally flawed. The taxable service falling within the scope of Section 65(90a) and enumerated to be a taxable service under Section 65(105)(zzzz) is the renting of immovable property. A reading of clause (90a) and clause (zzzz) would indicate that a complex drafting methodology is adopted. Even in clause (90a) there are inclusionary and exclusionary clauses. Under this provision renting of immovable property or similar arrangement for use in course of or furtherance of business or commerce but excluding renting of immovable property by a religious body or to a religions body; renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre, are excluded. The Explanation under clause (90a) further defines the expression for use in the course or business or commerce and also incorporate a clarificatory clause for removal of doubts, not necessary for the purposes of these appeals. Similarly, in clause (zzzz) there are inclusionary or exclusionary clauses embedded.

10. On a true and fair construction of provisions of the exclusionary clause under Explanation 1 to Section 65(105)(zzzz); and in particular sub-clause (d) thereof, we are compelled to the conclusion that renting of buildings used for the purpose of accommodation including hotels, meaning thereby renting of a building for a hotel, is covered by the exclusionary clause and does not amount to an "immovable property", falling within the ambit of the taxable service in issue.

11. This Tribunal in *Ambience Construction India Ltd.* v. *Commr. of S.T., Hyderabad* - 2013 (31) S.T.R. 343 (Tri.-Bang.), having considered the identical provision categorically ruled that renting of immovable property for a hotel is expressly excluded from the ambit of the taxable service in Section 65(105)(zzzz). We are in respectful agreement with the said judgment passed by a Learned Single Member of this Tribunal.

12. It also requires to be noticed that in respect of the same appellant as herein, the appellate Authority, namely the Commissioner (Appeals), Central Excise and Customs, Jaipur-I vide the order dated 19-12-2013 in Order-in-Appeal No. 222/BC/ST/JPR-I/2013 has recorded a diametrically contrary conclusion, that the legislative intent of sub-clause (d) of Explanation 1 under Section 65(105)(zzzz) is not to tax immovable property used for accommodation which includes hotels; the legislative intent is clear, namely not to tax immovable property used for hotels; and that the definition of renting of immovable property excludes buildings used for the purpose of hotels.

13. Since we have concluded that the transaction in issue falls wholly outside the ambit of the taxable service, is not necessary to deal with the other contention urged on behalf of the appellant to impeach the impugned order namely, that since the appellant had entered into a joint venture with M/s. Indian Hotels Company Limited there is no relationship of a service provider and a service recipient, that is susceptible to the levy of service tax, *qua* the agreements between the parties."

**5.5** The *Jai Mahal Hotels* decision (supra) was followed by the Tribunal in *Paradise Mehak Properties Pvt. Ltd. & Others* v. *CCE & ST Jaipur-1* (supra) where also the hotels had been licensed by the appellant therein to IHCL.

**5.6** In *Orient Express Co. Ltd.* (supra), where the hotel was licensed by the appellant therein to IHCL for running, conducting and operating, under a similar agreement, the Tribunal found that there is no dispute on the fact that the entire property/space is used as hotel only and hence relying on *Jai Mahal Hotels* decision (supra). The Tribunal held that Revenue's stand that Service Tax is liable for renting of subject property is not correct and is untenable in law.

**5.7** Even in the recent decision in the case of *Ex Maharani Mahendra Kumari* v. *CCE & ST, Jaipur* (supra) presided over by the then president of CESTAT, the Tribunal further ruled that presence of other incidental facilities related to entertainment, personal care etc. does not exclude the building from the category of "hotel". The relevant portion of the decision is as under :

"6. The appellants claimed exclusion under the category of buildings used for the purpose of accommodation including hotels. Admittedly, the building and the land as appurtenant thereto are used for the purpose of running the hotel. The term "hotel" is not defined in the Finance Act, 1994. As generally understood, a hotel is for temporary accommodation of people paying for their rooms and meal. Many hotels will have various other incidental facilities relating to entertainment, personal care, etc. The presence of these facilities does not exclude the building from the category o f "hotel".

**5.8** We also note that verifications had been initiated with SIHL as far back as on 9-11-2005. However in spite of SIHL having given all the necessary clarification through their letters dated 15-12-2005 and 26-6-2006, including copies of the agreement concerned, the department did not issue the SCN till 17-3-2014. Hence the proceedings are clearly hit by limitation."

30. Against this decision of Tribunal, Revenue filed an appeal before the Hon'ble Supreme Court which was dismissed upholding the view of the Tribunal as reported in 2022 (63) GSTL 412 (SC). Following the same, we are of the considered opinion that the demand for the period 01.06.2007 to 31.03.2011 and for the period from 01.04.2012 to 30.06.2012 cannot sustain and requires to be set aside.

31. The Ld. Counsel argued on the ground of limitation also. We find that the issue is interpretational in nature and there were various litigations pending before the various forums as to the issue whether such agreements in which there is a sharing of profit can be considered as agreement for renting of immovable property. So also, Explanation-I to Section 65 (105) (zzzz) excludes hotels from the ambit of Renting of Immovable Property Service. For these reasons, we find that demand raised invoking the extended period cannot sustain and requires to be set aside. Appellant succeeds on the ground of limitation also.

32. After appreciating the facts, evidence and applying the decision in the case of *Grand Royale Enterprises* (supra), we are of the considered view that the demand cannot sustain both on merits as well as on limitation and requires to be set aside which we hereby do.

33. In the result, the appeals are allowed with consequential relief, if any.

(order pronounced in court on 22.06.2023)

sd/- sd/-

**(M. AJIT KUMAR)** **(SULEKHA BEEVI, C.S.)**
Member (Technical) Member (Judicial)

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