

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

Appeal Nos. ST/525/2011 and ST/549/2011

(Arising out of Order-in-Appeal No.109/2010 (MST) dated 29.6.2011 passed by the Commissioner of Central Excise (Appeals), Chennai)

Commissioner of GST & Central Excise, Chennai
M/s. Updater Services P. Ltd.

Appellants

Vs.

M/s. Updater Services P. Ltd.

Commissioner of GST & Central Excise, Chennai Respondents

Appearance

Shri N. Viswanathan, Advocate for the Assessee
Shri Jagan Babu, AC (AR) for the Department

CORAM

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

Date of Hearing :26.02.2019

Date of Pronouncement :04.03.2019

Final Order Nos. **40416-40417 / 2019**

Per Bench

Both these appeals arise out of a common impugned order and hence they are taken up together for disposal. For the sake of convenience, the parties herein are referred to as assessee and the department.

2. Brief facts are that the assessee is engaged in various services like Maintenance or Repair Services, Business Auxiliary Services, Outdoor Catering Services, Cargo Handling Services, Security Agency's Services, Courier Services, Cleaning Services etc. On verification of records, it was noticed that the assessee had realized an amount of Rs.63,90,740/- for the cleaning services rendered to the Child Trust Hospital but had not discharged the service tax of Rs.7,64,467/- on such amount. Further, it was noticed that the assessee had availed abatement of 50% in regard to outdoor catering service under Notification 1/2006-ST dated 1.3.2006. Even though they had availed the benefit of notification, they had also availed CENVAT credit in a consolidated manner in respect of telephone services, security services and courier services which are common input services for the various services provided by them. The department was of the view that the assesseees are not eligible for the 50% abatement in respect of outdoor catering services as they had violated the conditions of the said notification that CENVAT credit cannot be availed in respect of such output services. Show cause notice was issued proposing to demand the service tax in regard to the above two issues along with interest and also for imposing penalties. After due process of law, the original authority confirmed the demand of Rs.48,25,309/- under the above two issues and

imposed equal penalty. In appeal, Commissioner (Appeals) set aside the demand in respect of outdoor catering service for the extended period. But, however, confirmed the demand under this category for the normal period. Further, it was also held that they are not liable to pay service tax on the cleaning services provided by them to Child Trust Hospital. The assessee is in appeal aggrieved by the confirmation of demand for the normal period. The department has also come in appeal against the order setting aside the demand on the ground of limitation under the category of outdoor catering service and for setting aside the demand on cleaning services.

3. On behalf of the assessee Id. counsel Shri N.Viswanathan submitted that the assessee has rendered the cleaning services to Child Trust Hospital. The said hospital is a non-commercial trust with no commercial motive involved. He relied upon the CBEC circular in F. No. B1/6/2005-TRU dated 27.7.2005. He submitted that as per para 9.3, the cleaning services provided in relation to agriculture, horticulture etc. in respect of non-commercial building and premises thereof is not covered within the purview of service tax under this category. Adverting to para 9.2 of the said circular, he argued that only the cleaning services in respect of the commercial buildings such as multiplexes, shopping complex, office complex and industrial buildings would be covered by the levy of service tax. The

hospital being a charitable trust is a non-commercial building. The assessee is not liable to pay service and therefore Commissioner (Appeals) has rightly set aside the demand. He also furnished the documents showing that the child Trust Hospital is a charitable trust and is exempted under Section 12(A)(a) of the Income Tax Act, 1961. It is submitted by him that the Income Tax Department had renewed approval of the hospital for receiving donations under Section 80G(5)(iv) vide letter dated 28.6.2006. Again that a letter was issued by Kanchi Kamakoti Child Trust Hospital to the assessee wherein it is stated by the hospital that they are a charitable trust and the services provided by the assessee to the hospital is not subject to levy of service tax. The assessee has issued a letter dated 23.6.2006 to the department requesting for refund or adjustment of the service tax already paid by them under cleaning services. That all these documents would show that the hospital for which the assessee has rendered cleaning service is a non-commercial building and therefore the cleaning services is not subject to levy of service tax.

4. With respect to the second issue of eligibility of abatement under Notification 1/2006, the Id. counsel submitted that the demand for normal period has been confirmed by the Commissioner (Appeals). The notification provides that no CENVAT credit shall be availed for providing

such specified services listed therein. The Commissioner (Appeals) has held that the assessee has violated this condition in the notification. In the present case, only certain input services like telephone services, courier services, security services are common input services used for providing output service of outdoor catering service. As per Rule 6(5) of CCR, 2004, courier services would be covered and the same can be availed as common input services when they are rendering both taxable and exempted services. That the two common input services like telephone services and security services which were availed by them were in respect of other taxable services provided by them to which they are fully eligible under CCR 2004 subject to compliance with Rule 6 of the said Rule which they had complied with. That Notification 1/2006 did not bar availing the credit which are otherwise permitted under CCR, 2004. He thus argued that the confirmation of demand by the Commissioner (Appeals) for the normal period under this issue cannot sustain on merits

5. The Id. AR Shri Jagan Babu appeared and argued on behalf of the department. With regard to the cleaning services, he submitted that the assessee has rendered services to a hospital which receives fees for the treatment of patients and therefore the hospital has to be considered as commercial concern. Merely because they are falling under the purview of

charitable trust under the Income Tax Act, it cannot be considered that the said hospital is a non-commercial concern. The Commissioner (Appeals) has erred in setting aside the demand in this regard.

6. With regard to outdoor catering service, he submitted that the Commissioner (Appeals) has set aside the demand on the ground of limitation. Further, Commissioner (Appeals) has erred in not imposing penalty under section 78 invoking section 80 of the Finance Act, 1994. The demand in respect of irregular availment of notification 1/2006 was set aside for the extended period observing that the assessee was filing returns and that the department was aware of the fact. He argued that the fact that non-payment of service tax on cleaning services as well as irregular availment of notification, had come to light only on the audit conducted by the department. Hence there is clear suppression on the part of the assessee and dropping of the demand for the extended period is incorrect and illegal.

7. Heard both sides.

8. The first issue is with regard to the demand of service tax on cleaning services. The Commissioner (Appeals) has set aside the demand observing that the Child Trust Hospital for which the assessee has rendered the services is a non-commercial building. In Circular dated 27.7.2005 referred above, it is seen that the cleaning services in respect of non-

commercial building and premises thereof would not be covered within the purview of service tax under this category. In the present case, the assessee has produced documents to show that the said hospital been given approval under section 80G(5)(iv) of the Income Tax Act for deduction in donations made to Kanchi Kamakoti Child Trust Hospital. The department merely alleges that the hospital is receiving fees and therefore cannot be considered as non-commercial hospital. No evidence is put forth by the department that the hospital has collected expenses / fees from patients for treatment. If a hospital merely collects registration fees for registration of the patient and does not collect expenses for treatment, it cannot be said that the said hospital would fall out of the category of non-commercial building / hospital. The department having failed to establish with evidence, that Child Trust Hospital is a commercial building, we are of the considered opinion that the conclusion arrived by the Commissioner (Appeals) that the said hospital is a non-commercial hospital and the services rendered by the assessee to the hospital would not come within the purview of service tax requires no interference.

9. The department has come in appeal alleging that the Commissioner (Appeals) has dropped the penalty in respect of demand for normal period on outdoor catering services invoking Section 80 and also set aside the demand in respect

of outdoor caterings service for the extended period. On perusal of the impugned order, we find that apart from alleging that the assessee did not disclose the service tax payable under cleaning service, there is no allegation of suppression of facts on the part of the assessee. We have already held that cleaning services are not subject to levy of service tax. From the discussions made by Commissioner (Appeals), we find that the conclusion of the Commissioner (Appeals) that demand for the extended period cannot sustain requires no interference, so also we are of the opinion that the penalty has been rightly set aside by the Commissioner (Appeals).

10. The next issue is with regard to the appeal filed by the assessee for the demand confirmed in respect of outdoor catering service for the normal period. The assessee does not deny that they have availed common input services in the nature of telephone service, courier service and security services for providing outdoor catering service as well as other taxable services. The Id. Counsel has made a frail effort to take shelter under Rule 6(5) of CCR, 2004. The said Rule applies only in case when the common input services are availed for providing exempted service and taxable services. In the present case, there are no exempted services provided by the assessee. The assessee has availed the benefit of notification 1/2006. One of the condition in the said notification is that the

assessee should not avail credit on input services used for providing such output service. They have availed credit on various input services like telephone, courier, security which are used for providing outdoor catering service. On such score, it is very much clear that there is violation of the condition of the notification. Therefore, the assessee cannot take the benefit of notification. The demand confirmed by Commissioner (Appeals) for the normal period on outdoor catering service, in our view, is legal and proper. Resultantly, the impugned order does not call for any interference.

11. The appeals filed by the assessee (ST/549/2011) and department (ST/525/2011) are without merit and both are dismissed.

(Pronounced in court on 04.03.2019)

(Madhu Mohan Damodhar)
Member (Technical)

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

Rex