CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH, COURT NO-I

Service Tax Appeal No. 54346 of 2015

(Arising out of order-in-original No. ALW-EXCUS-O-I-O-COM-09-15-16, dated 13.07.2015 passed by the Principal Commissioner of Central Excise, Alwar)

M/s Oberoi Vanyavilas **Appellant**
Ranthambore Road,
Sawai Madhopur-322001
(Rajasthan)

VERSUS

Principal Commissioner of Central Excise, **Respondent**
Alwar, A Block, Surya Nagar, Alwar

APPEARANCE:

Shri N. Singhvi, Advocate for the appellant
Shri Sanjay Jain, Authorised Representative for the respondent

CORAM:

HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION: 25.07.2019

FINAL ORDER NO. 51551/2019

BIJAY KUMAR:

The present appeal is filed against order in original dated 13.07.2015 passed by the Commissioner of Central Excise, Alwar, against M/s Oberoi Vanyavilas, Ranthambore Road, Sawai Madhopur, Rajasthan (for short the appellant). By the impugned order Learned Commissioner confirmed the demand of Service Tax of Rs. 90,99,444/- along with applicable interest and penalty under the provisions of Section 73(1), 75, 78 (1)(B) of Finance Act, 1994, (for short Finance Act). Being aggrieved by the order the appellant is in appeal before this Tribunal.

2. The brief facts of the case are that the appellant is a hotel located in the state of Rajasthan and is part of Oberoi group of hotels and engaged in providing Restaurant and Short Term Accommodation service classifiable under sub clause (zzzzv) and (zzzzw) of clause (105) of the Finance Act, respectively. The appellant is registered with the Service Tax Department for providing the other services also namely, Mandap Keeper Service, Business Auxiliary Service, Rant a Cab Operator, Health Club and Fitness Centre, Dry Cleaning, and Internet Cafe etc. under the provisions of Section 65 of the Act. The appellant was issued a show cause notice dated 19.05.2015 proposing for recovery of service tax for the aforesaid amount pertaining to the period from the April 2012 to September, 2013, in contravention of Section 68 of Finance Act, read with rule 6 of Service Tax Rules, 1994, (for short Service Tax Rule) read with the Notification No. 1/2006-ST dated 1.03.2006 as amended by Notification No. 34/2011-ST dated 25.04.2011, Notification No. 26/2012-ST dated 20.06.2012 and Rule 2C of Service Tax (Determination of Value Rules, 2006) [for short the valuation rule].

3. It was noticed by the department that the appellant while providing accommodation and restaurant services paid the service tax by availing the benefit of Notifications No. 1/2006 as amended and also rule 2C of the Service Tax Valuation Rules incorrectly as the conditions stipulated had not been followed. The Notification and the Rules prescribe that the benefit under the Notification and Valuation Rules would be applicable only when the service provider, did not avail the benefit of Cenvat Credit under the Rule 6 of Cenvat Credit Rules, 2004.

4. We have heard the learned Advocate on behalf of the appellant and also the learned Authorized Representative on behalf of the Department.

5. Learned Advocate submitted that the impugned order has wrongly confirmed the demand and denied abatement under the said Notification and the Valuation Rules as alleged in the Show Cause Notice. The appellant in fact is eligible for the abatement and has not violated any of the provisions of the Finance Act including that of Rule 6 of Cenvat Credit Rules. The Cenvat credit pertaining to input services used in providing output services is available to the appellant and there is no restriction in the Notification in respect of availing of such credit. The Notification restricts the credit only in respect of those input services, which are use for providing the restaurant/ short-term accommodation services. Further, the restrictions contained in the Notification is applicable only till the period till June, 2012 only. For the period from July, 2012, no such restriction has been provided for in the Finance Act as regards Cenvat credit on input services for such services.

6. It is further submitted that the Cenvat credit which was used for providing exempted services had been reversed by the appellant on proportional basis as per Rule 6 of the Cenvat Credit Rules. This fact has not been disputed in the impugned order also. The appellant has determined the Cenvat Credit on a proportionate basis and made appropriate adjustment by June of next year along with interest. The reversal of credit in terms of rule 6 satisfied the requirement of non-availment of cenvat credit, which is also provided in Rule 6(3D) of the Credit Rules. Thus the abatement is admissible to the appellant and the denial such benefit, as held in the impugned order is not sustainable. The appellant as placed reliance on the following case law in respect of his contention.

- **Chandrapur Magnet Wires (P) Limited v. Collector, 1996 (81) ELT 3 (SC)**
- **Hello Mineral Water (P) Limited v. Union of India, 2004 (174) ELT 422 (All)**
- **Commissioner v. Sanjay Engineering Industries, 2016 (43) STR 354 (Raj)**
- **Tree House Hotel Club & Spa v. Commissiner, 2017 (4) GSTL 39 (Tri-Del)**

- **Beekay Engineering Corporation v. Commissioner, 2018-TIOL-292-CESTAT- DEL**

7. It has also been contended that the proportional reversal of credit as followed by the appellant would make the provisions of Rule 3 workable and the benefit of Rule 6(3) could not be denied when it has been complied with by placing reliance on the Tribunal's decision in Reliance **Life Insurance Company Limited vs. Commissioner,** 2017-TIOL-3839-CESTAT-MUM.

8. Considering the difficulty faced by the above Rule, Rule 6 (3AA) provides for proportionate reversal even at the later stage. In view of above, it has been submitted by the learned Advocate that the impugned order requires to be set aside.

9. Learned Advocate also placed reliance on the order passed by this Tribunal in their own case in Appeal ST/51432/2014 pertaining to the period May, 2011 to March, 2012 and Appeal ST/51638/2016, for the period from October, 2013 to March, 2014. The said decisions are also applicable to the fact and circumstances of present case also, which is on similar allegations.

10. Learned Authorized Representative on behalf of revenue however, supports the impugned order.

11. We have considered the rival submissions and also perused the case records.

12. The issue involved is regarding the claim of the appellant for the benefit of abatement in terms of Notification No. 1/2006 as amended and Rule 2C of valuation rules. Notification No. 1/2006-ST, as amended, provides for the abatement from the value of taxable services at the rate of 50% on short-term accommodation services and at the rate of 70% on the restaurant services. From July/2012, the amending Notification No. 26/2012-ST, dated 20.06.2012 provides for an abatement of 40% on short-

term accommodation services and Rule 2C of service tax valuation rules provides for value of service portion in restaurant services as 40%. In fact, service tax is payable on 60% and 40% of value of short-term accommodation service and restaurant services respectively. These abatements are subject to condition of non-availment of Cenvat credit on inputs and capital goods. The valuation of restaurant services under Rule 2C is also subject to condition of non-availment of Cenvat credit on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1984. These provisions would be applicable for the period from July, 2012 to September, 2013.

13. The appellant was rendering both taxable and exempted services and was following the provisions of Rule 6 of Cenvat Credit Rules for which it also filed intimation letter to the department. During the relevant period, the appellant availed full Cenvat credit of input services used exclusively for provisions of taxable services and utilized the same but as regards exempted good, it took Cenvat credit on common inputs services but utilized only proportionate credit (in proportion of turnover of taxable services to total turnover). The proportionate reversal was provisionally determined on the basis of turnover of previous year, which was finalized at the end of June next year and the credit was reversed with interest. Therefore, the appellant utilized only proportionate eligible credit and remaining credit was not carried forward to the next year. This reversal of Cenvat credit would amount to having not taken Cenvat credit in view of the decisions referred to above. Accordingly, the impugned order is not sustainable and liable to be set aside.

14. We also find that the issue is no longer res-integra as this Tribunal in their own case has allowed abatement pertaining to previous and also subsequent period by orders dated 03.07.2018 as reported in TIOL-1982-

CESTAT-DEL. It will be relevant to reproduce the relevant paragraph of the Final Order which is as under:

> 7. First we consider the claim of the appellant for the benefit of abatement in terms of Notification No. 1/2006-ST ibid. The abatement @ 50% and 70% will be available to short term accommodation service restaurant service subject to the condition that no cenvat credit is availed on input, input services and capital goods. The appellant does not deny the fact that they have availed the credit on input services. A part of the input services is exclusively used for provision of taxable services for which service tax is payable at full rate. Since the such cenvat credit has been used only for payment of service tax on taxable service at full rate, there can be no objection to allow the same.
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> 8. In respect of the credit availed on common input services, the picture is not so clear. The services where the benefit of Notification No. 1/2006- ST is claimed, will fall under the definition of "exempted service" as per Rule 2(e) of the Cenvat Credit Rules, 2004. The appellant, after availing the credit on common input services, has claimed that they have utilised only proportionate credit for payment of service tax on output service. The utilisation has been restricted in the proportion of turnover of its taxable service to total turnover, by considering the turnover from short term 5 S. T. Appeal Nos. 51210, 51431-51432 of 2014 accommodation service as well as restaurant service as exempted service. Further, the proportion was provisionally determined on the basis of the turnover for the previous year and the same was finally determined at the end of the year and adjustment was made for reversal of credit with interest later on.
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> 9. From the above, we note that the appellant has followed the proportionate method for availment of credit on common input services. It cannot be said that the appellant has availed any credit on input services used in providing exempted service. The reversal of credit as above satisfies the requirement of non availment of credit laid down in the Notification No. 1/2006-ST ibid.
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> 10. It is a settled position of law that proportionate reversal at a later date will satisfy the requirement of non availment of cenvat credit. This view is supported by various decisions of the Supreme Court/ High Courts and Tribunal, some of which have been cited by the appellant.
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> 11. The procedure prescribed in Rule 6(3A) of the Credit Rules is only to make the provisions of Rule 3 workable. By means of proportionate reversal the requirement of Rule 6(3) has been substantially satisfied. This is also provided in Rule 6(3D) of the Cenvat Credit Rules which was introduced at a later date.
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> 12. In view of the above, the benefit of abatement as per Notification No. 1/2006-ST cannot be denied to the appellant and the demands raised on this ground is set aside.

15. A similar view was taken in the final order dated 3.07.2019, and the relevant paragraph is reproduced as under:

6.1 Foremost the Notification No. 26/2012 dated 28.06.2012 has to be looked into. The relevant entry at Serial No. 6 reads as follows:

Sl. No.	**Description of taxable service**	**Percentage**	**Conditions**
6.	Renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes.	60	Cenvat credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the Cenvat Credit Rules, 2004.

6.2 Perusal thereof clarifies that the condition for availment of abatement qua the services of short term residence/ lodging the credit on inputs and capital goods should not have been availed. Admittedly, the said credit has not been availed. The condition is absolutely silent about availment of credit on input services. Hence, we are of the opinion that the Adjudicating Authority below has committed an error while considering the availment of credit on input services as the condition for denial of the benefit of said Notification.

7. Now coming to Rule 2(c) of Service Tax (Determination of Value) Rules, 2006 with respect to services provided by the restaurant, we observe that serial No. 1 reads as follows:

Sl.No.	**Description**	**Percentage of the total amount**
1.	Service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity, at a restaurant	40

Explanation 1: ---------

Explanation 2: For the removal of doubts, it is clarified that the provider of taxable service shall not take cenvat credit of duties or cess paid on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1985 (5 of 1986).

7.1 Perusal makes it clear that 40% abatement on total amount is availed in case of restaurant services. Explanation 2 thereof clarifies that the provider of taxable service shall not take the cenvat credit of duties or cess paid on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1985 i.e. the availment of credit only on goods as mentioned above is the condition for availment of the said abetment qua restaurant services. Apparently and admittedly, cenvat credit was availed on input services hence denial of the benefit of the impugned Notification qua restaurant services is also held as unreasonable rather illegal.

8. Coming to the aspect of proportionate availment as has been impressed upon by the learned Counsel, we observe that the Adjudicating Authority below has acknowledged about the proportional availment of the cenvat credit qua the input services but there is no apparent finding to that effect in the impugned Order. The law to this effect is already settled. Rather in appellant's own case as has been

brought to our notice by the learned Counsel wherein it has been held that once the appellant has followed the proportionate method for availment of credit on common input services, it cannot be said that appellant has availed any credit on input services used in providing exempted services. The same is otherwise permissible in terms of Rule 6 of Cenvat Credit Rules, 2004. The Commissioner has committed an error while not referring any findings qua the said issue.

16. In view of above discussion and following the precedent decisions of this Tribunal, we set aside the impugned order and allow the appeal.

(Order pronounced in open Court).

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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