CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 51613 of 2018 [SM]

[Arising out of Order-in-Appeal No.62 (RK) ST/JPR/2017-18 dated 23.02.2018 passed by the Commissioner (Appeals) & ADG DGGSTI (JZU), Jaipur].

M/s. Rambagh Golf Club, **...Appellant**
Bhagwan Das Road, Jaipur

VERSUS

Commissioner
Central Excise Commissionerate **...Respondent**
Jaipur

APPEARANCE:

Mr.Jatin Mahajan, Advocate for the Appellant
Ms. Tamanna Alam, Authorised Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING/DECISION:25.02.2022

FINAL ORDER No. 50252/2022

RACHNA GUPTA

Present is an appeal assailing the order in appeal bearing No. No.62 (RK) ST/JPR/2017-18 dated 23.02.2018 vide which though the entire demand as was initially proposed by the SCN has been set aside but still the demand of Cenvat Credit of Rs.593384 alongwith interest and penalty has been confirmed.

2. The facts in brief for the purpose are that the appellant is engaged in providing club membership and restaurant services and is registered under service tax. During the course of the audit department observed that the appellant was providing taxable as well as the exempted service but was not maintaining a separate account nor was paying the amount as determined under sub-rule 3 A of Rule 6 of Cenvat Credit Rules, 2004. During the period of October, 2008 to April, 2011 service Tax of Rs.15,59,873/- but was alleged as short. The abetment as taken by the appellant was also alleged to be in contravention of Notification No.1/2006-ST dated 1.3.2006 as amended vide Notification No. 34 dated 25.4.2011. Service tax of Rs.15,30,348/- during the period of 1st May, 2011 to 30th June, 2012 on the abated value of Rs.1,40,19,223/- was also alleged to be short paid. Accordingly, vide Show Cause Notice No.1613 dated 16.04.2014 an amount of Rs.30,90,221/- was proposed to be recovered alongwith proportionate interest and appropriate penalty. While adjudicating the said Show Cause Notice the Original Adjudicating Authority had dropped the demand of service tax of Rs.30,90,221/-. However had confirmed the demand of Cenvat Credit amounting to Rs.5,93,384/- alongwith the penalty of the same amount. Being aggrieved the appeal was preferred before the Commissioner (Appeals) who has rejected the appeal finding no infirmity in the Order in Original. Still being aggrieved the appellant is before this Tribunal.

3. I have heard Shri Jatin Mahajan, ld. Counsel for the appellant and Ms. Tamanna Alam, ld. D.R. for the Department.

4. It is submitted on behalf of the appellant that the demand confirmed is out of the scope of Show Cause Notice and is liable to be set aside on this score only. The Show Cause Notice is mentioned to have proposed the demand of Service Tax of Rs.30,90,221/- only. There was no proposal for demand of Cenvat Credit of Rs. 5,93,384/-. It is further submitted that the major demand of service tax was dropped by the Adjudicating Authorities on the ground that the Cenvat Credit as was taken by the appellant was reversed and accordingly, abatement under Notification was held justified by the authorities while dropping the entire demand of Service Tax. Confirming the amount of Cenvat Credit is therefore against the legal provisions, the factual basis and even contrary to the findings of adjudicating authority itself. The order under challenge is accordingly, prayed to be set aside. Appeal is prayed to be allowed.

5. Per contra, ld. DR has laid emphasis upon the findings in para 5 of the order under challenge. It is submitted that irrespective the Cenvat Credit has been reversed by the appellant but the said reversal was only after it was pointed out by the Audit Team of the Department. Hence there is no infirmity while confirming the demand of said Cenvat Credit and imposition of penalty. Appeal is prayed to be dismissed.

6. After hearing the parties, perusing the record, I observe and hold as follows:-

The Department vide the impugned SCN dated 16.4.2014 has proposed the following demand:-

1. Service Tax Rs.30,90,221/- (Rs.15,59,873/- + Rs.15,30,348/-) should not be recovered from them under proviso to Section 73(1) of the Finance Act,1944 read with Rule 14 of Cenvat Credit Rules, 2004. As assessee have deposited Service Tax an amounting to Rs.4,42,251/- vide challan No.0039 on 31.12.2012, the same is liable to be appropriated in the Govt. Exchequer.
2. Interest should not be demanded and recovered from them under Section 75 of the Finance Act, 1994. As the assessee have deposited interest amount of Rs.1,32,369/- vide challan No.00039 dated 31.12.2012, the same should be appropriated in the Govt. account.
3. Penalty should not be imposed upon them in terms of the provisions of Section 78 of the Finance Act, 1994 read with Rule 15 of Cenvat Credit Rules, 2004 for contravention of the provisions of Section 67 & 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994.

7. The order under challenge has confirmed the following demand:-

> *"7. In view of the above, I uphold the findings of the Adjudicating Authority regarding confirmation of demand Cenvat Credit of Rs.5,93,384/- alongwith interest and imposition of penalty under Section 78 of the Finance Act, 1994 read with Rule 15(2) of the Cenvat Credit Rules, 2004."*

8. The bare perusal makes it clear that the demand confirmed is out of the scope of the SCN. Law is settled that the SCN is the basis of the litigation arising with respect to the proposal contained

therein and the adjudicating authorities have to remain within the four bounds of the said SCN.

9. Further the Adjudicating Authority in para 4.7 has held as follows:-

> *"I find that the quantum of Cenvat Credit availed in the case is Rs.4,42,251/- upto March, 2012 and Rs.1,51,133/- from April to June, 2012 and the entire Cenvat Credit stands deposited alongwith interest leviable thereon and the same has been verified by the jurisdictional Service Tax Division."*

10. Commissioner Appeals also has held :

> *"6.I find that the appellant is providing taxable as well as exempted services. I find that the adjudicating authority extended the benefit of Rule 6 (3) (ii) of Cenvat Credit Rules, 2004 to the appellant on reversal of Cenvat credit availed on input services utilized by the appellant in providing both taxable as well as exempted services, since the appellant has reversed the entire Cenvat credit of Rs.5,93,384/- availed by them during the period from October, 2008 to June 2012 alongwith interest. Also, the Cenvat credit availed by the appellant was treated to be inadmissible since they were not entitled to avail the same as per the provisions of Rules, 2004.*
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> *6.1 I find that the appellant has contended that they had maintained separate records in respect of input services used in taxable and exempted services. However, the appellant failed to provide the documentary evidence to substantiate their claim. Further, I find that the kind of services on which input credit has been availed by the appellant were used for providing output services in respect*

of Club Membership and restaurant services both. Therefore, the appellant failed to fulfil the conditions provided under Ryle 6 (2) of the Cenvat Credit Rules, 2004. The appellant also failed to reverse the proportionate Credit attributed to the exempted service as provided under Rule 6 (3) of the CCR, 2004 and had reversed the Credit only when the audit has observed the discrepancy. Therefore, I find that the appellant failed to comply with any options stipulated in Rule 6 of the CCR, 2004 and hence the Cenvat Credit availed by them is not admissible to them.

6.2 Regarding the issue of imposing penalty under Rule 15(2) of the CCR, 2004 read with Section 78 of the Finance Act, 1994, I find that the appellant were very much aware of the facts that they are providing taxable and exempted services and were required to follow the procedure as laid down under Rule 6 of the CCR, 2004. It is also observed that they not only availed the Cenvat credit on common input services but also utilized the same towards their service tax liability. The Appellant never disclosed these facts to the department and as such suppressed the material facts from the department. Therefore, they have deliberately and wrongly availed & utilized the Cenvat Credit of Rs.5,93,384/- which is required to be recovered from the appellant along with interest and penalty is imposable on them"

11. The perusal of above extract from the orders of adjudicating authorities shows clear acknowledgement that the appellant has reversed the entire Cenvat Credit alongwith with the interest. The findings confirming the demand of said amount are contrary to their own observations and thus are liable to be set aside. These finding are sufficient in addition to hold that the confirmation of demand of Cenvat Credit of Rs.5,93,384/- is not only beyond the scope of SCN

but is also contrary to the findings of the adjudicating authorities. The order under challenge is accordingly held to be unreasonable. Hence is hereby set aside. Consequent thereto, appeal stands allowed**.**

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita