CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Service Tax Appeal No.51665 of 2016-CU (DB)

(Arising out of order in original No. 04/Comm./Hapur/2015-16 dated 07.07.2015 passed by the Commissioner of Customs, Excise & Service Tax, Hapur, U.P.).

M/s Leisure Hotels Limited **Appellant**
Hari Bhawan, Aryapatta Slopes
Mallital, Nainital (Uttarakhand).

VERSUS

Commissioner of Central Goods & Service Tax, Customs & Central Excise **Respondent**
E-Block, Nehru Colony
Haridwar Road, Dehradun
Uttarakhand.

AND

Service Tax Appeal No. 53719 of 2015-CU (DB)

(Arising out of order in original No. 04/Comm./Hapur/2015-16 dated 07.07.2015 passed by the Commissioner of Customs, Excise & Service Tax, Hapur, U.P.).

Commissioner of Central Goods & Service Tax, Customs & Central Excise **Appellant**
E-Block, Nehru Colony
Haridwar Road, Dehradun
Uttarakhand.

VERSUS

M/s Leisure Hotels Limited **Respondent**
Hari Bhawan, Aryapatta Slopes
Mallital, Nainital (Uttarakhand).

APPEARANCE:

Shri Kapil Vaish, Chartered Accountant for the assessee
Shri G. R. Singh, Authorised Representative for the Department

CORAM: HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

FINALORDER NOs.51215-51216/2019

DATE OF HEARING: 04.04.2019
DATE OF DECISION: 13.09.2019

ANIL CHOUDHARY:

The appellant, Leisure Hotels Ltd. is a registered company and engaged in the business of running hotels, restaurants, etc. at various places. They are registered with the Service Tax Department. The issue in these appeals are –

- Whether for the period August, 8/2008 to June, 6/2012, the buildings (at Corbett Ramnagar & Naukuchiyatal) which were renting, covered in the definition of immovable property, and appellants were therefore liable for payment of service tax under the provisions of Finance Act, 1994 (for short "Act").

- Whether w.e.f. 01.07.2012, the appellants are eligible for abatement of 40% in terms of notification no.26/2012.

- Whether the appellants are liable for payment of service tax on letting out plant/machinery and fixtures to M/s. Mahindra Holidays & Resorts India Ltd. (MHRIL for short) under Supply of Tangible Goods. (SOTGS for short)

- Whether extended period of limitation is invokable.

- Whether penalty under Section 77 and 78 is imposable.

2. The cross Appeal by revenue is for enhancement of penalty imposed under Section 78 of Finance Act.

3. The brief facts are that the team of Central Preventive Officers visited the appellants office at Nainital on 19.09.2013. During the course of investigation, a statement of Mr. Anuj Sexena, Manager (Corporate & Finance) has been recorded on 01.04.2014, wherein he stated that:-

(a) Appellants are registered under service tax since 07.02.2008 in the category of management consultancy, renting of immovable property, club/association membership, tour operator, health club and fitness centre etc.

(b) The account of the unit have been audited by Central Excise Department till September, 2011.

(c) Appellants have rented their premises at Corbett, Naukuchiyatal to M/s. Club Mahendra Holidays & Resorts India Ltd., on lease and have not paid the service tax upto June, 2012. Thereafter, appellants have paid service tax after availing abatement of 40%. It was mentioned that the facility of bar, swimming pool, restaurant, fitness centre etc. are all part and parcel of the hotel.

(d) The amount received on account of hiring of plant and machinery is not covered under supply of tangible goods services, as the said goods remained under the possession and control of M/s.Mahendra Holidays & Resorts India Ltd.

(e) Service tax of Rs. 24,38,245/- has been paid after the visit of Central Preventive Officers on 18-09-2013. Appellants have opted for VCES Scheme for the remaining tax.

4. Against the aforesaid factual background, a show cause notice dt. 23-04-2014 **(Annexure 3)** was issued proposing to demand service tax Rs. 1,43,21,974/- towards service tax on the amount received during 01-04-2008 to 31-08-2013 under proviso to section 73(1) of Finance Act, 1994. It also proposed to demand interest under section 75 of Finance Act, 1994, besides imposition of penalty under section 77 & 78 of Finance Act, 1994. It also proposed to appropriate the amount of Rs. 24,38,245/- already deposited by the appellants.

5. It is alleged in the SCN as under:-

(a) Appellants have received Rs. 11,20,72,500/- as rent for the premises at Naukuchiyatal & Corbett (Ramnagar) from M/s Mahendra Holidays & Resorts India Ltd, Chennai.

(b) Appellants have not accepted service tax liability in respect of renting of immovable property service for their hotel building for the period April 2008 to June 2012.

(c) Appellants have not accepted service tax liability under supply of tangible goods service on the amount of rent received for alleged supply of machinery, appliance etc.

(d) In view of above legal provisions and definitions of "renting of Immovable Property" it appears that the plea taken by appellants that the lease of property for hotel was not taxable under service tax till June 2012, as the premises were leased for hotel i.e. for residential/accommodation purpose, is not tenable in view of the Explanation 1 & 2 of Section 65 (zzzz) of Finance Act, 1994 as mentioned above.

Explanation-1 to section 65(105) (zzzz) is applicable when the premises is solely for residential purpose. But in the instant case M/s Mahendra Holidays & Resorts India Ltd, has taken the subject premises for the purpose of holidays homes/resorts and the premises have facility of swimming pool/bar/restaurant/conference hall/fitness centre etc. Premises are not leased out exclusively for the purpose of accommodation, but also for furtherance of business and commerce.

Explanation-2 of section 65 (105) (zzzz) categorically states that an immovable property party for use in the course or furtherance of business and 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. Thus services rendered by appellant appear to be covered under the renting of immovable property.

(e) Appellants contention that leasing of machinery equipment and appliances for use by M/s Mahendra Holidays & Resorts India Ltd is not covered under the definition of supply of tangible goods services, does not appear to be correct.

(f) From perusal of terms and condition of the lease deed, it appears that right to use is not transferred as appellants retain the permissions and license relating to resort, including plant/machinery and other appliances.

(g) Even though the custody have been transferred along with permission to use the property, M/s Mahendra Holidays & Resorts India Ltd is not free to use the property including equipments in any manner as they like and conditions have been imposed on their use and control.

(h) The transaction does not involve transfer of right to use the property and equipments, as in terms of agreement the possession and effective control over them has not been transferred.

(i) Appellants have accepted that they were not paying VAT on transaction described as supply of other assets/appliances with no VAT/SALES TAX charged or paid. They themselves have not considered the transaction as deemed sale.

(j) Appellants have contravened provision of section 68 (payment of service tax), section 69 (not obtaining registration during 2008-09 to 2012-13) section 70(non filing of returns).

(k) Extended period of limitation is invokable.

(l) Appellants have filed a declaration under VCES but the said declaration was not a true declaration pertaining to renting of immovable property service in as much as appellants have not disclosed service tax liability, yet to be discharged during 2008-09 to June 2012.

(m) W.e.f. 01-07-2012, Appellants have started paying service tax on renting of immovable property services but appellants have availed abatement of 40%, which is not admissible to them.

(n) Vide summon dated 14-11-2011, investigation was being carried out in respect of services or renting of immovable property and supply of tangible goods for the period 2008-09 onward and was pending on 01-03-2013. Therefore VCES 2013, claim filed by appellant for renting of immovable property services for the period July 2012 to December 2012 does not appear to be admissible to them.

(o) A sum of Rs. 9,80,641/- has been paid against various services for the period January 2013 to August 2013 after departmental visit on 19-09-2013. The said amount along with the amount of Rs. 14,57,604/- is liable to be appropriated.

6. Ld. Counsel urges that so far the disputed period August, 2008 to June, 2012 is concerned, the building at Corbett and Naukuchiyatal were not covered in the definition of immovable property and thus, the appellant was not liable for payment of service tax till 30.06.2012. Under Section 65(105)(zzzz), "Renting of Immovable Property Service" defined as -- "any service provided or to be provided to any person by any other person in relation to renting of immovable property for use in the course of or for furtherance of business or commerce" but it does not include – (d) building used solely for residential purposes and building used for purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

> **Explanation II** provides that for the purpose 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"

7. The aforementioned definition was amended retrospectively by Finance Act, 2010. However, the exclusion for hotels in Clause (d) in Explanation (1) continued.

8. Ld. Counsel further states that the Commissioner has erred in holding that the appellant's hotel provides other facilities like swimming pool, bar and restaurant, conference halls, etc. Thus, the building is not solely used for the purpose of accommodation as these

are commercial in nature. Ld. Counsel submits that the facilities of swimming pool, bar and restaurants, conference, etc. available at the hotels are for the persons residing therein exclusively. Moreover, these facilities do not change the nature of building, which is a hotel. Ld. Counsel further relies on the clarificatory circular /letter DOF No.334/I/TRU dated 28.02.2007 issued by CBEC, wherein in Clause 6.3, with regard to taxation of renting of immovable property services, it has been clarified that the immovable property excluded from the scope of the services are – residential accommodation such as hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities, among others. Ld. Counsel further relies on the precedent ruling of this Tribunal in **Jai Mahal Hotels Pvt. Ltd. Vs. Commissioner of Central Excise, Jaipur -2014 (36) STR 669** and also on the ruling of this Tribunal in **Paradise Mehak Properties Pvt. Ltd.- 2017 (6) GSTL 350 (T).**

9. So far as the demand for the period from 1.7.2012 is concerned, ld. Counsel states that the appellants are eligible for abatement of 40% in terms of Notification No.26/2012-ST dated 20.06.2012, wherein Clause VI in the table provides, that in case of renting of hotels, hostels, guest houses, club, camp sites or other commercial places, meant for residential or lodging purposes shall be entitled to abatement of 40% and taxable 60%, subject to the condition that cenvat credit on inputs and capital goods used for providing the taxable service has not been taken. Ld. Commissioner has erred in holding that although the appellant’s contention of availability of abatement is correct but the same is not available as the appellant has

not proved that they have not availed cenvat of duty paid on inputs and capital goods.

10. Ld. Counsel further points out that in the course of investigation, the appellant accepted their tax liability subject to abatement of 40%. Further, the show cause notice did not propose to disallow the abatement on the condition of cenvat credit has not been satisfied. The tax was proposed for the period from 1.7.2012 on the ground that renting of immovable property service is taxable. Thus, the ld. Commissioner has travelled beyond the scope of the show cause notice. Thus, the demand for this period from 1.7.2012 is vitiated. Ld. Counsel further mentions that though the appellant had taken cenvat credit of Rs.40,536/- during the period from July, 2012 to August, 2013 on input services but the same was nowhere connected with the output service of leasing of hotels.

11. So far as the next issue is concerned regarding the service tax under the category of "supply of tangible goods service", being separate charges received from the lessee-Mahindra Holiday and Resorts for use of plant and machinery and fixtures. It is urged that these are installed in the hotel premises, which has been let out lease out. The complete control and possession of these goods have been given to the Mahendra Holidays. Such granting of right to use with delivery of the goods amounts to deemed sale, which is liable to VAT. Thus, excluded from the levy of service tax. Service tax under SOTG is applicable when the goods are provided for use without transfer of right to possession and effective control. Ld. Commissioner has erred in holding that even though the custody /possession has been

transferred along with right to use, Mahendra Holiday is not free to use the goods including the equipments, in any manner, as they are liable, and conditions have been imposed on their use and control. Further, the appellant has admittedly not paid any VAT. Ld. Counsel states that non-payment of VAT is not a pre-condition for applicability of liability under service tax. Further, reliance is placed on the ruling of this Tribunal in the case of **Chattisgarh Earth Movers – 2017 (6) GSTL 297 (T)** and **Brahmaputra Valley Construction & Suppliers -2018 (14) GSTL 355 (T).**

12. Ld. Counsel further urges under the admitted facts that the appellant neither charged nor collected service tax, cum-duty benefit, which is allowable for the entire period. Further, under the facts and circumstances, the issue is debatable and one of interpretation, the extended period of limitation is not invokable. Further, the penalty under Section 77 and 78 are not imposable.

13. Ld. Authorised Representative for Revenue supporting the findings of the ld. Commissioner, further urges that the appellant is not entitled to any abatement as rightly held by the ld. Commissioner w.e.f. 1.7.2012.

14. Ld. Authorised Representative further relies on the ruling of the Coordinate Bench of this Tribunal in the case of **Ramkumar Giri – 2018 (10) GSTL 577 (Tribunal-Chennai)**, wherein the assessee had entered into an agreement for lease of property for the purpose of hotel. They paid service tax during the period Jun, 2007 to September, 2007 and thereafter on the understanding that hotel would not be covered within the purview of the definition of "Renting of Immovable

Property", they applied for refund, which was rejected. This Tribunal took notice of the main ground on which the refund application was rejected, holding that -- the building that comprises of lodging house also restaurant, banquet hall, etc. therefore, would not fall within the meaning of hotel. It was further noticed from the lease deed, that portion of the building has been specifically let out for payment of rent separately and further, the lease rent was separately defined for renting of the hotel building, hotel (lodging house, restaurant, coffee shop, banquet hall and bar). This Tribunal held that only that part of the building which is used for accommodation would fall within the exemption part of the definition. It is further observed that it is not the case that the restaurant, coffee shop, permit room/bars, etc. are fully available only for the exclusive use for the lodgers, who stay in the hotels.

13. Having considered the rival contentions, I find that the facts in the case of **Ramkumar Giri – 2018 (10) G.S.T.L. 577 (Tribunal-Chennai),** relied upon by the Revenue are not applicable to the present case. Rather the facts are akin to the ruling in the case of **Jai Mahal Hotels Pvt. Ltd.(supra)**, wherein vide **Final Order No.ST/A/52121-52122/2014-CU(DB) dated 8.5.2014,** wherein it has been held that on true and fair construction of the provisions of Exclusionary Clause under Explanation I to Section 65(105) (zzzz) and in particular, sub-clause (d) thereof, it was held that renting of building 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 taxable service. Accordingly, it is held that

for the part of the disputed period August, 2008 to 30.06.2012, the appellant is not liable to service tax. For the period from 1.7.2012, the appellants have admittedly deposited the service tax and has not disputed their liability, subject to abatement. Under the facts and circumstances, we hold that the appellant, as provided in Notification No.26/2012-ST, is entitled to abatement of 40% and is liable for service tax only on the balance receipt of 60% with respect to the lease rent of the hotel.

14. So far as the liability to service tax under SOTG is concerned, under the facts and circumstances, it appears that the amount received per annum is not wholly for supply of tangible goods, as the plant and machinery, which are embedded to the earth and the fixtures and fittings, which cannot be removed without cannibalising them, and their removal may destruct, is not classifiable as goods, as the same are immovable. We further find that as the appellant remains owner of the hotel premises, the goods or fittings therein which have been made available to the lessee, do not amount to delivery, as the goods in question are in the constructive possession of the appellant. Accordingly, we hold that the appellant shall not be liable to service tax under the category of SOTG on the goods which are present in the hotel premises, which are immovable in nature. Accordingly, this issue is remanded to the Adjudicating Authority for a re-determination in view of our findings and observation. The appellant is also directed to furnish the details to the Adjudicating Authority with respect to the value of the plant and machinery /fixtures which are not movable and the goods which are movable, so as to work out the proportionate amount towards movable goods for calculation of service tax.

15. So far the penalties are concerned, we hold that the issue is wholly interpretational in nature. Further, the transaction is duly recorded in the books of accounts maintained in the ordinary course of business and thus, there is no contumacious conduct on the part of the appellant. Accordingly, we set aside the penalty under Section 77 and 78 of the Act. Thus, the appeal is allowed in part, as indicated above.

16. The appeal filed by the Department is accordingly rejected.

(Pronounced on 13.09.2019).

(Anil Choudhary)
Member (Judicial)

(**Bijay Kumar**)
Member (Technical)

Ckp