CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Service Tax Appeal No.ST/50635/2014-CU [DB]

[Arising out of Order-in-Original No. JAI-EXCUS-001-COM-062-13-14 dated 23.09.2013 passed by the Central Excise & Service Tax, Commissionerate, Jaipur-I.]

M/s. Jai Mahal Palace Hotel ...Appellant

Vs.

C.C.E & S.T.-Jaipur-I …Respondent

Appearance:

Mr. Pradeep Jain, CA, for the Appellant
Mr. Ranjan Khana, DR for the Respondent

CORAM:
Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon’ble Mr. Ashok. K. Arya, Member (Technical)

Date of Hearing.10.07.2017
Date of Decision.13.07.2017

Final Order No. 55116 /2017

Per S.K. Mohanty:

This appeal is directed against the impugned order dated 21.10.2013 passed by the Commissioner of Central Excise and Service Tax, Jaipur, wherein service tax demand of Rs. 1,04,82,263/- was confirmed along with interest against the appellant. Besides penalties were also imposed under Section 77and 78 of the Finance Act, 1994. The said demands were confirmed on two issues namely, denial of benefit claimed under Notification No. 1/2006-ST on the ground cenvat credit in respect of various inputs and input services were availed by the appellant. Further, the appellant did not pay service tax on the restaurant service provided by it.

2. The ld. Advocate appearing for the appellant submitted that due to inadvertence, the appellant avails cenvat credit on the input services, which was reversed subsequently and the reversal particulars were duly reflected in the revised returns filed by the appellant. Thus, he submits that since the credit was reversed *suo moto*, the same tantamount to non availment of cenvat credit and accordingly, the benefit of Notification No. 1/2006 –ST should be available to the appellant. In this context, the ld. Advocate relied on the judgment of Hon'ble Supreme Court in the case of Chanderpur Magnet Wires Pvt. Ltd. V. Commissioner of Central Excise, Nagpur 1996(81) E.L.T 3(SC). With regard to the issue of liability of service tax on open air restaurant, the ld. Advocate submitted that no service tax can be levied on such

restaurants, since the requirement of Section 65(105) (zzzv) of the Finance Act, 1994 has not been satisfied. The ld. Advocate has relied on the Circular No. 139/8/2011-TRU dated 10.05.2011 to state that the open air restaurant will not fall under the purview of the taxable service.

3. On the other hand, ld. DR appearing for the respondent reiterated the findings recorded in the impugned order.

4. Heard both sides and perused the records.

5. On perusal of the case records, we find that the benefit of Notification No. 1/2006-ST was denied to the appellant on the ground that it had availed cenvat credit on the input services used for providing the output service. The fact is not under dispute that the credit so availed was reversed by the appellant *suo moto* and no proceedings were initiated for recovery of such credit. Thus, upon reversal of cenvat credit on the input service, it has to be construed that no credit has at all been taken by the appellant. On a similar case, the Hon'ble Supreme Court in the case of Chanderpur Magnet Wires Pvt. Ltd. (supra) have held that on reversal of modvat credit, the appellant is entitled to avail exemption. In this case, since the

credit was reversed the benefit of Notification No. 1/2006-ST should be available to the appellant for claim of abatement.

6. The authorities below have confirmed the demand of service tax on the ground that taxable services were providing by the appellant from the restaurant Giardino, Phulwari/ Pool Side. It is an admitted fact on record that these are open air restaurant and the conditions mentioned in Section 65(105)(zzzzv) that the restaurant should have the facility of air conditioning; the restaurant has license to serve alcoholic beverages have not satisfied in this case. In context with leviabiltiy of service tax on the restaurant, the CBEC vide Circular dated 10.05.2011 has clarified the following:

If there are more than one restaurants belonging to the same entity in a complex, out of which only one or more satisfy both the criteria relating to air-conditioning and license to serve liquor, will the other restaurant(s) be also liable to pay Service Tax?	*Service tax is leviable on the service provided by a restaurant which satisfies two conditions (i) it should have the facility of air condition in any part of the establishment and (ii) it should have license to serve alcoholic beverages. Within the same clearly demarcated and separately named, the ones which satisfy both the criteria is only liable to service tax.*

7. In view of the above referred Circular issued by the CBEC, since the appellant has not provided the services mentioned therein, service tax demand on the restaurant service cannot be confirmed against the appellant.

8. In view of the above, we do not find any merits in the impugned order. Accordingly, after setting aside the same, we allow the appeal in favour of the appellant.

(Pronounced in the open court on 13.07.2017)

(Ashok K. Arya)
Member(Technical)

(S. K. Mohanty)
Member (Judicial)

Sakshi