CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. II

Date of hearing: 09.03.2018
Date of pronouncement: 30.05.2018

S. T. Appeal Nos. 51210, 51431-51432 of 2014
(Arising out of Order-in-Original No. JAI-EXCUS-001-COM-078-13-14, JAI-EXCuS-001-COM-075-13-14 and JAI-EXCUS-001-COM-076-13-14 dated 04.12.2013, dt. 26.11.2013& dt. 03.12.2013 passed by the Commissioner, Central Excise, Jaipur).

M/s The Oberoi Rajvilas — Appellant
M/s Trident
M/s Oberoi Vanyavilas

Vs.

CCE, Jaipur-I — Respondent

Appearance:

Sh. B. L. Narasimhan & Sh. Narender Singhvi, Advocates for the appellant

Sh. Ranjan Khanna & Sh. Sanjay Jain, ARs for the Respondent

Coram:

Hon'ble Mr. S. K. Mohanty, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order Nos. 52052 – 52054/2018

Per: **V. Padmanabhan**:

The appellants are hotels located in the State of Rajasthan and are part of the Oberoi Group. These appeals have been filed against various orders passed by the jurisdictional authorities but involve common issues for the period May 2001 to March, 2012. All appeals are disposed off through this common order.

2. The appellant is engaged in providing restaurant and short term accommodation services which became taxable from 01.05.2011. Notification No. 1/2006-ST dated 01.03.2006 as amended provides for abatement @ 50% (for short term accommodation services) and 70% (on restaurant services). This abatement is subject to the condition of non availment of credit on inputs, input services and capital goods. Through the impugned proceedings, the Department sought to deny the benefit of abatement under the above notification and demanded payment of service tax at the full rate, for the reason that the appellant was availing cenvat credit on certain input services. Further, in respect of two of the appeals, there was one more issue. The appellant hotel had an open restaurant. The Department was of the view that service tax was liable to be paid for the service carried out in the open air restaurant, since the facility of air conditioning was available in certain other parts of the hotel establishment. Aggrieved by the above impugned orders, the present three appeals are filed.

3. With the above background, we heard Sh. B. L. Narasimhan with Sh. N. Singhvi, ld. Advocates as well as Sh. Ranjan Khanna and Sh. Sanjay Jain, ld. ARs for the Revenue.

4. The arguments advanced on behalf of the appellant are summarised below:-

i) Ld. Advocate submitted that the appellant provides certain taxable services such as Spa, Laundry etc. in respect of which tax is being paid on full value of services without abatement. He submitted that during the relevant period appellant availed cenvat credit on input services. But he submitted that part of the credit on input services was taken only for exclusive use in payment of service tax on taxable services. With reference to the credit availed on common input services, the appellant availed and utilised only proportionate credit in the proportion of turnover of its taxable service to total turnover. In view of the above, he submitted that the benefit of abatement cannot be denied to the appellant.

ii) In respect of the open air restaurant, he submitted that the same will not be covered under the service tax net and as such no service tax will be payable on this count.

iii) He also relied on various case laws:-

- Chandrapur Magnet Wires (P) Ltd. vs. Collector-1996 (81) ELT 3 (SC).
- Hello Mineral Water (P) Ltd. vs. Union of India – 2004 (174) ELT 422 (All)
- Commissioner vs. Sanjay Engg. Industries -2016 (43) STR 354 (Raj.)
- Beekay Engg. Corporation vs. Commissioner –Final Order No. 57761/2017 dt. 09.11.2017
- Tree House Hotel Club & Spa vs. Commissioner – Final Order No. 52854/2017 dt. 13.04.2017

5. Ld. AR appearing for the Revenue justified the impugned orders. He argued that the appellant is not denying the fact that they have availed cenvat credit on common input services. Hence, it is his submission that the condition specified in the Notification No. 1/2006-ST dated 01.03.2006 is not satisfied and hence the adjudicating authority was justified in demanding service tax without abatement.

In respect of the open air restaurant, he submitted that the service tax levy on restaurant will be applicable if there is facility of air conditioning in any part of the establishment at any time during the financial year. Since other parts of the hotel are airconditioned, he justified the levy of service tax.

6. Heard both sides and perused the appeal record.

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.

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

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.

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.

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.

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.

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.

13. Next we turn the issue of payment of service tax on income from open air restaurant. The taxable service of restaurant as defined in Section 65(105)(zzzzv) of the Act lays down two fold conditions:-

(a) the restaurant must have the facility of airconditioning; and

(b) it must have the license to serve alcoholic beverages.

It is undisputed that the open air restaurant does not have the facility of airconditioner. Hence, such restaurant cannot be said to be covered within the definition of the service as above. Further, the CBEC Circular No. 139/8/2011-TRU dated 10.05.2011 clarifies that within the same entity, if there are more than one restaurants, which are clearly demarcated the one with A/C alone will be liable to service tax.

In view of the above clarification, there is no justification to demand service tax on the income from open air restaurant.

14. In view of the above discussions, the impugned orders are set aside and all the three appeals are allowed.

(Pronounced on 30.05.2018).

(S. K. Mohanty) Member (Judicial)	(V. Padmanabhan) Member (Technical)

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