

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT -IV

Service Tax Appeal No.ST/52998/2018 -ST [SM]

[Arising out of Order-in-Appeal No.09-RK-ST-JPR-2018-19
dated 18/04/2018 passed by the COMMISSIONER OF CGST &
CENTRAL EXCISE-JAIPUR-I

RED FOX HOTELS

...Appellant

Vs.

C.C.E. & S.T.-JAIPUR-I

... Respondent

Present for the Appellant : Mr.Anil Sood, Advocates
Present for the Respondent: Ms. Tamanna Alam, D.R.

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

Date of Hearing : 28/11/2018
Pronounced on :19/12/2018

Final ORDER NO. 53435 /2018

PER: RACHNA GUPTA

Present is an appeal preferred against the order of
Commissioner (Appeals) bearing No.09 dated 10.04.2018.

2. The appellants are holder of Service Tax Registration for
providing services as that of cab operators convention service,
Banking and Financial Service, Business Auxiliary Service,
Internet café, restaurant service and accommodation services.
During the course of audit of records of the appellant, the

Department observed that the appellants have not paid Service Tax amounting to Rs.6,98,525/- during the period w.e.f. 2008 to 2011-12 (upto September, 2012). It was also observed that the appellant has wrongly taken credit of Rs.43,98,511/- during the period from October, 2008 to September, 2009 and reversed the same in the month of October, 2009 without payment of any interest on the Cenvat Credit so availed.

2.1 With these observations, a show cause notice bearing No.3,769/- dated 25.02.2013 was issued to the appellant proposing the recovery of the said Service Tax of Rs.6,98,525/-, while appropriating the amount of Rs.49,138/- as already been deposited by the appellant alongwith the interest at appropriate rate and the penalties under Section 75, 76 and 78 of Central Excise Act, 1944. The demand as proposed was confirmed by the order of Additional Commissioner bearing No.115 dated 30th September, 2014. Being aggrieved, an appeal was preferred before Commissioner (Appeals), who has partially allowed the appeal thereby dropping the demand of interest of Rs.3,67,731/- on the amount of Cenvat Credit already reversed by the appellant. However, the demand of Service Tax of Rs.6,49,387/- alongwith the interest under Section 75 of the Act and the penalty except the reduced penalty as earlier imposed under Section 78 of the Act was confirmed. The penalty imposed under Section 76 of the Act was also set aside by invoking the provisions of Section 80 of the Act. Still being aggrieved, the assessee-appellant is before this Tribunal.

2. I have heard Shri Anil Sood, Id. Advocate for the appellant and Ms. Tamanna Alam, Id. AR for the Department.

3. It is submitted by Id. Counsel that the cenvat credit has been denied to the appellant on the construction services received for building the premises required by the appellant for providing the output services. It has also been denied on providing internet café services and even the security services. It is submitted that these issues have already been decided in favour of the appellant vide the decision in their own case titled as **M/s. Lemon Tree Hotels Pvt. Ltd. vs. CST, Chennai reported in 2018 (1) TMI 1215**. Similarly, with respect to providing complimentary breakfast, it is submitted that the same is not taxable. However, Commissioner (Appeals) has denied the same. The findings are prayed to be set aside.

3.1 It is further submitted that there is no Service Tax liability as far as the commission received by the appellant is concerned. The demand confirmed in that respect also is liable to be set aside. Id. Counsel has also alleged that the show cause notice is barred by time as there is no intention to evade payment of duty on the part of the appellant as is alleged. Finally, conceding that the penalty on the balance payment amounting to Rs.2,217/- alongwith the interest is the liability of the appellant, the remaining entire demand is prayed to be set aside. Appeal is prayed to be allowed.

4. Ld. A.R. while rebutting these arguments has submitted that the wrong availment of cenvat credit would not have come to the notice of the Department unless and until the audit in question would have been done. Despite the duty of self declaring the correct facts, the concealment or the misrepresentation of relevant fact entitles the Department to invoke the extended period of limitation. Hence, present is not the case of show cause notice being barred by time. With respect to the merits of the present case, the order of Commissioner (Appeals) has been justified, impressing upon no infirmity therein, the appeal is accordingly prayed to be dismissed.

5. After hearing both the parties, the considered opinion of mine with respect to the various demands herein is as follows:-

Cenvat Credit availed and utilized in respect of services as that of Construction of the Hotel Building of the Appellant:

6. I observe that in a decision with respect to appellant's another hotel i.e. Lemon Tree Hotels Pvt. Ltd. the Mumbai Tribunal has already held as follows:-

"6. The only issue is that whether CENVAT Credit in respect of construction service is available in terms of Rule 6 (5) of the CENVAT Credit Rules, 2004. The contention of Revenue is that the output service has no nexus with the construction service. Therefore, consruction service was exclusively used for non-taxable service. Hence the credit in terms of Rule 6 (5) is not available. We do not agree with the contention of Revenue for the reason that the overall hotel

business is rendered within the common hotel building and the construction service received in respect of construction of any part of the hotel is a common input service which has nexus with overall hotel business. Therefore, even though some part of the hotel business is not taxable, but it cannot be said that the construction service was used exclusively for non-taxable service. The hotel building is common for all taxable and non-taxable service. Therefore, the construction service is squarely covered under Rule (6(5) and credit is admissible."

6.1 Similarly in another case of **Lemon Tree Hotels itself reported in 2017 (7) TMI 799 –CESTAT, Hyderabad** in para 7 & 8 held as under:

"7 that input services include the services used in relation to setting up, modernization, renovation of premises of provider of output services. In the case in hand, the definition is reproduced as above categorically will apply and the clarification given by the Board in CBEC Circular dated 04.01.2008 is going beyond the definition as reproduced is herein above. We find that similar issue as to eligibility to avail the CENVAT credit on design and engineering of pipe line, services rendered by the pipeline laying of contractors, was denied in the case of Reliance Gas Transportation Infrastructure Ltd., (Supra), holding that these services were utilized for being into existence an immovable property. The Bench after considering the definition of input services, held that the provisions of Section 2 (1) of the CENVAT Credit Rules, 2004 very clearly indicate eligibility to avail CENVAT credit of the service tax paid on these services.

8. Views of the Tribunal have been fortified by decision of the Hon'ble High Court of Gujarat in the case of **Mundra Ports and Special Economic Zone Ltd. - 2015 (39) STR 726 (Guj. H.C.)** the ratio is in paragraph No.7, 8 & 9 which we with respect reproduce:

7. It is not disputed that jetty was constructed and input credit was claimed on cement and steel. The aforesaid definition of Rule 2(k) was applicable and Explanation 2 did not provide that cement and steel would not be eligible for input credit. According to learned Counsel for the appellant, the appellant is not manufacturer and, therefore, the provisions of Explanation 2 of Rule 2(k) would be applicable only to the factory and manufacturer. The appellant is neither having any factory nor he is manufacturer. The appellant is a service provider of port. We need not go into this question as to whether the appellant is a factory or manufacturer or service provider in view of the fact that it is not disputed by Mr. Y.N. Ravani, learned counsel appearing for the Revenue in this Tax Appeal that the appellant provides service on port for which he is getting jetty constructed through the contractor and the appellant has claimed input credit on cement and steel. The cement and steel were not included in Explanation 2 from 2004 up to March, 2006. The Cenvat Credit Rules, 2004 were amended in exercise of the powers conferred by Section 37 of the Central Excise Act, 1944 with effect from 7-7-2009, the date on which it was notified by the Central Government from the date of the notification. According to learned Counsel for the appellant, this amended

definition would apply only to the factory or manufacturer and would not apply to the service provider. According to him, either before the amendment made in the year 2009 or thereafter, the appellant was neither factory nor manufacturer and he has only constructed jetty by use of cement and steel for which he was entitled for input credit as jetty was constructed by the contractor, but the jetty is situated within the port area and the appellant is a service provider. According to the appellant, his case is squarely covered by the judgment of the Division Bench of the Andhra Pradesh High Court in Commissioner of Central Excise, Visakhapatnam-II v. Sai Sahmita Storages (P) Limited, [2011 \(270\) E.L.T. 33](#) (A.P.) = [2011 \(23\) S.T.R. 341](#) (A.P.) wherein in Paragraph 7, it has been clearly held that a plain reading of the definition of Rule 2(k) would demonstrate that all the goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable service for providing an output service are eligible for Cenvat credit. It is not in dispute that the appellant is a taxable service provider on port under the category of port services. Therefore, the appellant was entitled for input credit and the decision of the Division Bench of the Andhra Pradesh High Court squarely applies to the facts of the case and answered the question on which the appeal has been admitted.

7. In view of above discussed law the finding of Commissioner (Appeals) declining the credit qua construction

of hotel building of appellant are therefore not sustainable. The order to that extent is hereby set aside.

(2) **Cenvat Credit availed and utilized in respect of security services and Internet Services commonly used:**

8. I observe that the full cenvat credit on 16 services specified under Rule 6 (5) is admissible to the appellant. The security services being one among said specified services. The credit stands available to the appellant. The issue is otherwise no more *res-integra* as it was already been settled in appellant's own case titled as **M/s. Lemon Tree Hotels Pvt. Ltd. vs. C.S.T., Chennai reported in 2018 (1) TMI 1215** wherein the decision of Tidel Park Ltd. vs. **C.S.T., Chennai reported in 2010 (18) STR 642** was relied upon. It was held as follows:-

"2. I have heard both sides and find merit in the submission of the assesseees that they are entitled to the whole of the credit of the service tax paid on taxable service as specified in 17 specified categories covered by Rule 6(5) as such service is not used exclusively in or in relation to the providing of exempted services. Rule 6(5) is a non obstante clause and therefore completely widens the restriction contained in Rule 6(3)(c). It is not the case of the Revenue that the taxable service on which service tax has been paid is not one of 17 categories specified in Rule 6(5) of Cenvat Credit Rules, 2004. I, therefore, set aside the impugned order by accepting that the assesseees are entitled to entire credit, and allow the

appeal with consequential relief due to the appellants in accordance with law.”

9. Above all, it is brought out from the record that the appellants were rendering taxable services of cab operators convention service, Banking and Financial Service, Business Auxiliary Service, Internet café, restaurant service and accommodation services. The input service credit was availed by the appellant on the construction services which were used for setting up of the premises from where the output services were rendered by the appellant and on the internet café and security services for the same premises from where the output services were to be rendered by the appellant. The Department does not have the case that any of these services were not rendered by the appellant for providing the output services. In view of the definition of input in Section 2 (k) of CCR, 2004 and in view of Section 6 (5) thereof no question of denial and utilization of credit, therefore, at all arises. The findings of Commissioner (Appeals), therefore, are held to be in violation of judicial discipline, and thus, are liable to set aside to this effect.

10. However, as far as the findings qua dropping the demand of interest for the credit reversed subsequently without utilization, as has been dropped by the Commissioner (Appeals), and about reducing the proportionate penalty and also doing away the penalty under Section 76 while invoking Section 88 of the Act, the Department has not gone into

appeal. The order stands attained finality. I otherwise find no infirmity qua those findings, order to that aspect retains.

11. As a result of the entire above discussion, the order under challenge confirming the demand is hereby set aside. Appeal accordingly stands allowed.

[Pronounced in the Open Court on 19.12.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita