IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV

DATE OF HEARING : 19/12/2018.
DATE OF DECISION: 19/12/2018.

Service Tax Appeal No. 52380 of 2016

[Arising out of the Order-in-Appeal No. 18/ST/DLH/2016-17 dated 30/05/2016 passed by The Commissioner (Appeals – I), Service Tax, Delhi – I.]

M/s Gujarmal Modi Hospital & Research]
Centre for Medical Sciences] Appellant

Versus

CST, Delhi – II Respondent

Appearance

S/Shri Manish Gaur and Narender Singhvi, Advocate – for the appellant.

Shri Sanjay Jain, Authorized Representative (DR) – for the Respondent.

CORAM: **Hon'ble Shri C.L. Mahar, Member (Technical)**
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order No. 53505/2018 Dated : 19/12/2018

Per. C.L. Mahar :-

The brief facts of the matter are that the appellant are an established chain of hospitals providing health services and health check up and diagnosis services. For providing the health services and consultation, the appellant have entered into

agreements with various doctors and specialist doctors whereby the appellant provides the basic infrastructure facilities and administrative support to the visiting doctors and specialist doctors. As per the agreement a part of the doctors visiting consultation fee is retained by the appellant in view of the consultant's making use of medical facilities, such as, radiology, pathology and all diagnostic available with the hospital and other administrative facilities. The department is of the view that the appellant is providing support services of business or commerce as defined under Section 65 (104c) readwith Section 65 (105) (zzzq). In as much as the part of the fee retained by the appellant was in lieu of making provision for infrastructure and support services to the visiting doctors/ consultants. Accordingly two show cause notices were issued which were adjudicated by a common order-in-original dated 30th December 2015, wherein the service tax amounting to Rs. 39,72,679/- has been confirmed under Section 73 (1) of the Finance Act, 1994 and penalty under Section 78 has also been imposed on the appellant. The appellant have approached the Commissioner (Appeals) against the above-mentioned order-in-original and the Commissioner (Appeals) vide his impugned order dated 30th May, 2016 has dittoed the order of original Adjudicating Authority. The appellants are before us against the impugned order-in-appeal.

2. We have heard both the sides and we feel that the matter is no longer res-integra as this Tribunal in its final order No. ST/A/58226-58232/2017 dated 6th December 2017 in the case of

M/s Sir Ganga Ram Hospital and others vs. CCE, Delhi – I and others has held as under :-

"4. We have heard both the sides and perused the appeal records. We have also perused specifically the terms of some of the agreements on record. The dispute in the present appeals is with reference to the tax liability of the appellant hospitals under the category of business support services. The statutory provision for the said tax entry is as below :

> "Section 65(104c) 'support services of business or commerce' means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfillment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational or administrative assistance in any manner, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.
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> *Explanation.* - For the purposes of this clause, the expression 'infrastructural support services' includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security."

5. The claim of the Revenue is that the appellants have provided infrastructural support service to various doctors. As a consideration for such support, they have retained a part of the amount collected from visiting patients. We have perused some of the agreements/appointment arrangements entered into between the appellants hospitals and the individual doctors. Typically, the arrangement contains details like duration of time for consultation, the obligations on the part of the doctors, fee to be paid, procedure for termination of agreement, etc. The agreements generally talk about appointment of consultants to

provide services to the patients who will visit or admitted in the appellants hospital. The doctors will receive a percentage of share of the collection from the patients in case of consultation, procedures and surgeries done by them. In some cases, there is a provision for treating patients from low economic background without any financial benefits. On careful consideration of various terms and conditions and the scope of arrangement, we are of the considered view that such arrangement are for joint benefit of both the parties with shared obligations, responsibilities and benefits. The agreements do not specify the specific nature or list of facilities which can be categorized as infrastructural support to the doctors. The revenue model, as agreed upon between the contracting parties also, did not refer to any consideration attributable to such infrastructural support service.

6. The proceedings by the Revenue, initiated against the appellant hospitals, are mainly on the inference drawn to the effect that the retained amount by the hospitals out of total charges collected from the patients should be considered as an amount for providing the infrastructure like room and certain other secretarial facilities to the doctors to attend to their work in the appellants hospitals. We find this is only an inference and not coming out manifestly from the terms of the agreement. Here, it is very relevant to note that the appellant hospitals are engaged in providing health care services. This can be done by appointing the required professionals directly as employees. The same can also be done by having contractual arrangements like the present ones. In such arrangement, the doctors of required qualification are engaged/contractually appointed to provide health care services. It is a mutually beneficial arrangement. There is a revenue sharing model. The doctor is attending to the patient for treatment using his professional skill and knowledge. The appellants hospitals are managing the patients from the time they enter the hospital till they leave the premises. ID cards are provided, records are maintained, all the supporting assistance are also provided when the patients are in the appellant hospital premises. The appellant hospital also manages the follow-up procedures and provide for further health service in the manner as required by the patients. As can be seen that the

appellants hospitals are actually availing the professional services of the doctors for providing health care service. For this, they are paying the doctors. The retained money out of the amount charged from the patients is necessarily also for such health care services. The patient paid the full amount to the appellant hospitals and received health care services. For providing such services, the appellants entered into an agreement, as discussed above, with various consulting doctors. We do not find any business support services in such arrangement.

7. The inference made by the Revenue that the retained amount by the hospital is to compensate the infrastructural support provided to the doctors can be examined in another angle also. Reading the statutory provisions for BSS, we note that the services mentioned therein are "provided in relation to business or commerce." As such, to bring in a tax liability on the appellant hospital, it should be held that they are providing infrastructural support services in relation to business or commerce. That means, the doctors are in business or commerce and are provided with infrastructural support. This apparently is the view of the Revenue. We are not in agreement with such proposition. Doctors are engaged in medical profession. As examined by Hon'ble Gujarat High Court in *Dr. K.K. Shah* (supra), though in an income-tax case, we note that there is a discernable difference between "business" and "profession". The Gujarat High Court referred to decision of Hon'ble Supreme Court in *Dr. Devender Surtis* - AIR 1962 SC 63. The Supreme Court observed as below :

> "There is a fundamental distinction between a professional activity and an activity of a commercial character" : "...a "profession"... involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, of surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities" "...a professional activity must be an activity carried on by

> an individual by his personal skill and intelligence…… and unless the profession carried on by (a person) also partakes of the character of a commercial nature" the professional activity cannot be said to be an activity of a commercial character."

8. Applying the above ratio and examining the scope of the tax entry for BSS, we are of the considered view that there is no taxable activity identifiable in the present arrangement for tax liability of the appellant hospitals.

9. Under negative list regime w.e.f. 1-7-2012, the health care services are exempt from service tax. Earlier the health care services were only taxed for specified category of hospitals and for specified patients during the period 1-7-2010 to 1-5-2011. With effect from 1-5-2011, health care services were exempt from service tax under Notification No. 30/2011-S.T. After introduction of negative list tax regime, Notification No. 25/2011-S.T. exempted levy of service tax on health care services rendered by clinical establishments. We have examined the scope of the terms 'clinical establishments' and 'health care services'. The notification defines these terms. The term 'clinical establishments' is defined as below :

> "Clinical establishment" means hospital, nursing home, clinic, sanatorium or any other institution by whatever name called, that offers services or facilities requiring diagnosis or treatment of care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India, or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases."

10. The terms 'health care services' is defined as below :

> "health care services" means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognized system of medicines in India and includes services by way of transportation of the patient to and from a clinical

establishment but does not include their transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of both affected due to congenial defects, developmental abnormalities, injury or trauma."

11. These two provisions available in Notification No. 25/2012 will show that a clinical establishment providing health care services are exempted from service tax. The view of the Revenue that in spite of such exemption available to health care services, a part of the consideration received for such health care services from the patients shall be taxed as business support service/taxable service is not tenable. In effect this will defeat the exemption provided to the health care services by clinical establishments. Admittedly, the health care services are provided by the clinical establishments by engaging consultant doctors in terms of the arrangement as discussed above. For such services, amount is collected from the patients. The same is shared by the clinical establishment with the doctors. There is no legal justification to tax the share of clinical establishment on the ground that they have supported the commerce or business of doctors by providing infrastructure. We find that such assertion is neither factually nor legally sustainable".

3. Since, the facts in the present matter are identical to the one cited above, we follow the same and hold that the order-in-appeal is without any merit and thus, same is set aside. The appeal is allowed.

(Operative part of the order pronounced in the open court.)

(Rachna Gupta)
Member (Judicial)

(C.L. Mahar)
Member (Technical)

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