(2014) 05 CESTAT CK 0003

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 16 Of 2012 With Service Tax Miscellaneous No. 61223 Of 2013, Service Tax Appeal No. 56737 Of 2013

?M/s Jai Mahal Hotels Pvt. Limited APPELLANT

Vs

CCE, Jaipur RESPONDENT

Date of Decision : 08-05-2014

Acts Referred:
Finance Act, 1994 — Section 73(1), 65(90a), 65(105)(zzzz)

Citation : (2014) 05 CESTAT CK 0003

Hon'ble Judges : G. Raghuram, J;Rakesh Kumar, Technical Member

Bench : Division Bench

Advocate : R. Murlidharan, Govind Dixit

Final Decision : Dismissed

Judgement

1. The appellant is common in both the appeals. Appeals are preferred against two orders of the appellate Authority dated 21.10.2011 and 15.01.2013

confirming the levy and service tax of Rs.6,62,885/- plus interest; and Rs.1,28,751/- plus interest, for the periods 01.06.2007 to 30.11.2009 and

December 2009 to March 2010, respectively. The appellate orders rejected appeals preferred by the appellant herein against primary adjudication

orders dated 18.01.2011 and 03.06.2011. It requires to be noticed that the adjudication order dated 18.01.2011 was the culmination of the show cause

notice dated 02.02.2010 and proceedings were initiated invoking the extended period of limitation, under the proviso to Section 73(1) of the Finance

Act, 1994.

2. The concurrent orders passed by the authorities below concluded that the appellant had provided the taxable ""renting of immovable property

service, defined in Section 65(90a) read with Section 65(105)(zzzz) of the Act.

3. Appellant in response to the show cause notices issued, contested the liability to tax on two principal grounds:

(a) That it had entered into an agreement dated 28.08.1985 with M/s Indian Hotels Company Limited whereunder the parties entered into a joint

venture to run the hotel and therefore to share profits and losses alike, hence there was question of rendition of service by one person/ entity to

another; there existed no relationship of service provider and service recipient; and that sharing of profits and losses between joint ventures would not

amount to receipt of consideration for rendition of any taxable service; and

(b) That qua provisions of Section 65(105)(zzzz) and the exclusionary clause therein, a building or buildings used for hotels falls outside the purview of

the taxable service.

4. The Authorities below rejected these contentions.

5. That the appellant had leased its buildings to M/s Indian Hotels Company Limited is not in dispute not is it in dispute that the purpose of the transfer

of the property in favour of the other party is for establishment of a hotel. The issue is whether in such circumstances the transaction falls outside the

purview of the taxable service. Clause (zzzz) of Section 65(105) enumerates the taxable service as any service provided or to be provided to any other

person, by any person in relation to renting of immovable property for use in the course of or furtherance of business or commerce. Explanation 1

thereto enacts that for the purposes of this clause ""immovable property"" includes the categories of properties enumerates in sub-clauses (i) to (iv)

thereto. Thereafter an exclusionary clause is enacted comprising sub-clauses (a) to (d). For the purposes of this /is we are concerned with

exclusionary sub clause (d).

6. Relevant to our context, sub-clause (d) under Explanation 1 to clause 65(105)(zzzz) would read: ""immovable property"" does not include buildings

used for the purpose of accommodation, including hotels.

7. On a true and fair construction of the relevant provisions of the exclusionary clause adverted to above, the interpretation is compelling that buildings

used for or as hotels do not amount to immovable property. The legislative provision in question i.e. the exclusionary clause (d), to the extent relevant

and material, excludes from the purview of immovable property, buildings used for the purposes of accommodation including for hotels.

8. The view that has found favour with the Authorities below for rejecting the appellant's claim that leases for accommodating hotels is outside the

purview of the taxable service, is set out in paragraph 6.5 of the order of the learned Appellate Commissioner dated 21.10.2011 (the subject matter of

Service Tax Appeal No. 16 of 2012). The reasoning runs thus:

The legislative intent [sub clause (d)] is explicit and clear, not to tax immovable property used (not meant) for accommodation which includes hotels;

only the service of accommodation provided by a hotel is outside the purview of the taxable service, while other services provided by a hotel such as

services like mandap keeping, gym, spa, health club etc, are all taxable services.

9. In our considered view the above interpretation adopted by the Authorities below is fundamentally flawed. The taxable service falling within the

scope of Section 65(90a) and enumerated to be a taxable service under Section 65(105)(zzzz) is the renting of immovable property. A reading of

clause (90a) and clause (zzzz) would indicate that a complex drafting methodology is adopted. Even in clause (90a) there are inclusionary and

exclusionary clauses. Under this provision renting of immovable property or similar arrangement for use in course of or furtherance of business or

commerce but excluding renting of immovable property by a religious body or to a religions body; renting of immovable property to an educational

body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre, are excluded. The

Explanation under clause (90a) further defines the expression for use in the course or business or commerce and also incorporate a clarificatory

clause for removal of doubts, not necessary for the purposes of these appeals. Similarly, in clause (zzzz) there are inclusionary or exclusionary clauses

embedded.

10. On a true and fair construction of provisions of the exclusionary clause under Explanation 1 to Section 65(105)(zzzz): and in particular sub-clause

(d) thereof, we are compelled to the conclusion that renting of buildings 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 the

taxable service in issue.

11. This Tribunal in Ambience Construction India Ltd. vs. Commr. of S. T.

Hyderabad - 2013 (31) STR 343 (Tri. Bang.), having considered the

identical provision categorically ruled that renting of immovable proper for a hotel is expressly excluded from the ambit of the taxable service in

Section 65(105)(zzzz). We are in respectful agreement with the said judgment passed by a learned single Member of this Tribunal.

12. It also requires to be noticed that in respect of the same appellant as herein, the appellate Authority, namely the Commissioner (Appeals), Central

Excise and Customs, Jaipur-I vide the order dated 19.12.2013 in Order-in-Appeal No. 222/BC/ST/JPR- 1/2013 has recorded a diametrically contrary

conclusion, that the legislative intent of sub-clause (d) of Explanation 1 under Section 65(105)(zzzz) is not to tax immovable property used for

accommodation which includes hotels; the legislative intent is clear, namely not to tax immovable property used for hotels; and that the definition of

renting of immovable property excludes buildings used for the purpose of hotels.

13. Since we have concluded that the transaction in issue falls wholly outside the ambit of the taxable service, is not necessary to deal with the other

contention urged on behalf of the appellant to impeach the impugned order namely, that since the appellant had entered into a joint venture with M/s

Indian Hotels Company Limited there is no relationship of a service provider and a service recipient, that is susceptible to the levy of service tax, qua

the agreements between the parties.

14. On the aforesaid analyses, we allow the appeals and quash the impugned orders but in the circumstances without costs.

15. As the appeals have been disposed of Id. Counsel does not pursue the miscellaneous application. Misc. Application is therefore dismissed as

infractuous.

