
(2023) 06 CESTAT CK 0015

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No.42062, 42063 Of 2013

M/s. Peninsula Hotels (P) Ltd

APPELLANT

Vs

Commissioner Of GST & Central Excise

RESPONDENT

Date of Decision : 09-06-2023

Acts Referred:

Finance Act, 1994 — Section 65(90)(a), 65(105)(zzzz), 76, 77, 77(1), 77(2), 78

Citation : (2023) 06 CESTAT CK 0015

Hon'ble Judges : Sulekha Beevi C.S., Member (J);Ajit Kumar, Member (T)

Bench : Division Bench

Advocate : Joseph Prabhakar, K. Komathi

Final Decision : Allowed

Judgement

Sulekha Beevi C.S., Member (J)

1. Brief facts are that the appellant had entered into an agreement with M/s. GRT Regency (herein after referred to as "GRT") by which GRT obtained lease of the Hotel and the premises. GRT then obtained registration for providing 'Outdoor Catering Services' and 'Mandap Keeper Services'. During the scrutiny of records of GRT it was noticed that GRT had entered into an agreement dated 21.06.2010 with the appellant. The relevant part of the agreement reads as under:

"Whereas the 'Licencee' (GRT) is interested in running a boarding and lodging house on the property and the LICENCER (the assessee) has agreed to grant the property on a LICENCE to LICENCEE and certain terms and conditions have been mutually agreed upon;

"A sum calculated as 20% (Twenty percent) of the "GROSS ROOM Income" and all other income except Food & Beverage Income and 15% (Fifteen Percent) on the Food & Beverage Income derived from the said hotel, shall be payable as per License Fee to the 'LICENCER' on or before the tenth of the succeeding month, along with a statement showing particulars of the payment, and it shall be called MONTHLY LICENCE FEE. Service Tax or any other Tax leviable now or in the

future on the License Fee shall be deemed to be part of the above said fee percentages. The Room Income, Food & Beverage Income and other Income derived from the hotel shall be called Gross Turn Over of the Hotel”

2. The Department then requested the appellant to furnish details regarding the receipts of License fee from GRT. The appellant did not furnish the details. Later, the Range Superintendent requested GRT to furnish the details of License fee paid to appellant. GRT vide their letter dated 04.04.2011 furnished the details. It appeared to the Department that the license fee is nothing but rent paid by GRT to the appellant towards renting of the appellant's premises of M/s. Peninsula Hotels (P) Ltd. The activity was taxable under Renting of Immovable Property Service and the appellant is liable to pay service tax on the amounts received from GRT. The appellant had not paid service tax on such amounts received by them. Show Cause Notices were issued for the period June 2010 to February 2011 and March 2011 to June 2011 to the appellant proposing to demand service tax along with interest and for imposing penalties. After due process of law the original authority confirmed the demand along with interest and imposed penalties. On appeal the Commissioner (Appeals) upheld the same. Aggrieved by such order, the appellant is now before the Tribunal.

3. The learned Counsel Shri Joseph Prabhakar appeared and argued for the appellant. It is submitted by the learned counsel that, as per the License agreement dated 21.06.2010, the appellant had granted license to GRT to operate and run the Hotel. Though the appellant was earlier running the hotel and registered with the Department for providing 'Outdoor Catering Services' and 'Mandap Keeper Services', after executing the said agreement with GRT, the appellant exited the business of running the hotel. Consequently the appellant had surrendered the service tax registration on 09.07.2010.

4. GRT was operating and running the Hotel business and also obtained service tax registration on 24.06.2010. GRT, as part of running the Hotel business is rendering the following services in the premises from June 2010 onwards. (a) Health Club and Fitness Centre, (b) Outdoor Catering Services (c) Accommodation Services (d) Mandap Keeper Services (e) Banking & Financial Services.

5. It is submitted by the learned counsel that the appellant is not rendering any service in the premises, owned by the appellant. As per the License agreement, the appellant is not receiving any rent for leasing out immovable property. Appellant is receiving a share of the profit of running the hotel as agreed between the parties. The appellant has not received any consideration in the form of rent for providing the services of 'Renting of Immovable Property'.

6. The definition of the taxable service of Renting of Immovable Property as per Section 65(105)(zzzz) of Finance Act, 1994 was referred by the learned counsel which is reproduced as under:

“(zzzz) to any person, by any other person, by renting of immovable property or

any other service in relation to such renting for use in the course of or, for furtherance of business or commerce.

Explanation 1. – For the purposes of this sub-clause, “immovable property” includes –

(i) building and part of a building, and the land appurtenant thereto;

(ii) land incidental to the use of such building or part of a building;

(iii) the common or shared areas and facilities relating thereto;

and

(iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,

(v) Vacant land, given on lease or licence for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce but does not include-

(a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;

(b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;

(c) land used for educational, sports, circus, entertainment and parking purposes; and

(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding house, holiday accommodation, tents, camping facilities.

Explanation 2. - For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce”

7. It is urged by the learned counsel that as per the plain reading of the above definition, it can be seen that the term ‘immovable property’ excludes ‘Hotels’. It is very much clear that the transaction of grant of License to operate and run the hotel given to GRT is outside the purview of the taxable service.

8. The adjudicating authority has relied upon Explanation 2 of the above definition. It is discussed in para 8 of the Order-in-Original that the premises is used not only as Hotel and is also used for Mandap Keeper Services. The learned counsel asserted that as per the definition buildings used solely for residential purposes, and buildings used for the purposes of accommodation including Hotels is excluded. The Hotel run by GRT provides facility of room accommodation. Along with room facility a Hotel may be providing many other

services/facilities like restaurant, gym, mandap keeper services etc., which are ancillary to the service of providing room facility. Such services are also provided by GRT and not the appellant. The appellant does not have any control or decision as to the various services or facilities provided in the Hotel. It is run by GRT and the appellant receives share of income on monthly basis as agreed.

9. The learned counsel relied upon the judgments in the case of Jai Mahal Hotels Pvt. Limited Vs. Commissioner of Central Excise, Jaipur 2014 (36) S.T.R. 669 (Tri. Del.) and the decision of the Tribunal in the case of Grand Royale Enterprises Ltd. Vs. Commissioner of Service Tax, Chennai-I 2019 (31) G.S.T.L. 453 (Tri. – Chennai). It is submitted that this decision of the Tribunal has been affirmed by the Hon'ble Apex Court and the appeal filed by the Department has been dismissed as reported in Commissioner of Service Tax, Chennai Vs. Grand Royal Enterprises Ltd. 2022 (63) G.S.T.L. 412 (S.C.). The learned counsel prayed that the appeal may be allowed.

10. The learned AR, Ms. K. Komathi appeared and argued for the Department. The learned AR, adverted to the definition of the taxable service in clause 90 (a) of Section 65 and submitted that 'Renting of Immovable Property' includes renting, letting, leasing, licensing or other similar arrangements of immovable property. The definition includes arrangements of different types that are in nature of renting, letting, leasing and licensing. The appellant has entered into a license deed to permit GRT to operate and run the Hotel. Therefore, the said arrangement would fall within the definition of Renting of Immovable Property even though license fee is fixed on profit basis. The argument of the learned counsel that Renting of Hotels is excluded from the purview of definition was countered by the learned AR, by submitting that apart from providing room accommodation services, the Hotel is providing various other services. As per the explanation, even if it is partly used for residential or accommodation purposes when part of the building is used for other services, it is deemed to be used for the furtherance of business or commerce and would be covered by the definition. The appellant has received license fee as stated in the agreement for renting of the immovable property which is the Hotel. Hence the demand confirmed is legal and proper. The learned AR prayed that the appeal may be dismissed.

12. The issue is whether the appellant is liable to pay service tax under the category of 'Renting of Immovable Property Services' for the amounts received from GRT.

13. The definition of 'Renting of Immovable Property Services' has already been noticed in para 1 above. So also the relevant portion of the agreement is reproduced in para 1. It is the case of the appellant that they have entered into an agreement with GRT whereby GRT is given the permission to run the hotel. The question is as per the transfer of right in the agreement, whether there is an activity which is covered by the definition of 'Renting of Immovable Property Service'. The learned AR has emphasized that the definition is applicable to all arrangements of transfer of right of immovable property similar to the nature of

renting, letting, leasing and licensing. The nomenclature of the agreement entered between the parties is 'License Deed and the amount agreed to be paid by GRT to the appellant is to be called as per agreement as 'monthly licence fee'. The nomenclature used to describe the agreement is irrelevant and the intention of the parties as well as the character of the agreement has to be looked into to decide whether there is activity of renting of immovable property. Every transfer of right in the immovable property does not fall within the definition. Only such transfer of right which is akin to lease, renting, letting, licence would be covered. In other words, transactions like sale of immovable property, Mortgage etc., though involves transfer of right in the immovable property are outside the scope of the definition.

14. On closer scrutiny, the agreement states that 'Licencee (GRT) is interested in running a boarding and lodging house on the property'. The primary intention is to run a boarding and lodging business which is in the nature of accommodation facility as usually provided in a Hotel. All the other services rendered in the premises are rendered by GRT and are ancillary to the primary business of boarding and lodging. As per clause (d) of Explanation I of the definition, buildings used for Hotel are excluded.

15. To examine whether the agreement has a character of lease, it is also necessary to look in to the consideration received. As per the agreement there is no fixed assured rent paid to the appellant by GRT. A sum calculated as 20% of the 'Gross Room Income' and all other income, except food and beverage income and 15% on the food and beverage income derived from the hotel has to be paid on a monthly basis. It is also stated that room income, food or beverage income and other income derived shall be called as 'Gross Turnover of the Hotel'. It is thus sharing of profit of the business of the hotel and not a consideration paid for renting of the Hotel Building. If the business is at a loss or suppose the hotel has to be closed down (for eg., in a situation like lockdown during COVID-19) there may not be any income for the hotel. The appellant then does not get any consideration. Whereas in a situation of renting of immovable property, the consideration is for the service of providing renting of immovable property. In other words, the rent is paid all along when the transfer of right in the immovable property is active and alive.

16. Similar arrangement of licence granted to operate and run a Hotel was considered by the Tribunal in the case of Grand Royale Enterprises Ltd. Vs. Commissioner of Service Tax, Chennai-I 2019 (31) G.S.T.L. 453 (Tri. – Chennai). The Tribunal had set aside the demand and relied upon the decisions of the Tribunal in the case of Ambience Construction India Ltd. Vs. Commissioner of Service Tax, Hyderabad 2013 (31) S.T.R. 343 (Tri. Bang.) and Jai Mahal Hotels Pvt. Limited Vs. Commissioner of Central Excise, Jaipur 2014 (36) S.T.R. 669 (Tri. Del.). The relevant discussions reads as under:

"The facts of the case are that M/s. Green Royale Enterprises Ltd., the appellants herein, are engaged in the business of running hotels. The business assets of

Hotel Connemara, Madras, Westend Hotel, Bangalore and Savoy Hotel, Ooty owned by Spenser & Co. were transferred at book cost to M/s. Spencer International Hotels Ltd. (SIHL) vide an agreement dated 28-6-1978, which also granted long term lease of the land of the said three hotels to the latter. In a subsequent agreement dated 20-3-1984, SHIL granted licence to M/s. International Hotels Company Limited (IHCL) to run, conduct and operate the above three hotels along with related facilities and business appertaining thereto for 25 years. M/s. IHCL deposited with "SIHL" a sum of Rs. 5 crores as interest free deposit of which the latter would refund an amount of Rs. 2.50 crores at the end of 15 years and the balance would be refunded on the expiry of the agreement. As per para 4.1 of the agreement a consideration agreed was as under :

"(a) The license fee equivalent to 15% of the Annual Sales from the operation of the said three hotels till such time SIHL return half of the security deposit i.e. 2.5 Crores.

(b) The license fee equivalent to 20% of the Annual Sales from the operations of the said three hotels from the date on which SIHL return half of the security deposit i.e. 2.5 Crores :

Provided, however, that IHCL shall pay to SIHL a minimum license fee of Rs. 120 Lakhs per annum for the initial period of three years and a minimum license fee of Rs.150 Lakhs per annum from the fourth year onwards."

Subsequently, Hotel Connemara undertaking was transferred to the appellant by way of demerger scheme approved by the Hon'ble Madras High Court vide order dated 27-2-2009. In consequence, the IHCL started paying license fee in respect of Connemara Hotel undertaking to appellant from 2009-10 onwards under the same conditions. As the "license fee" received by the appellant was based on a certain percentage of the income from operations of the hotel business, it appeared to the department that appellant has rented out the immovable property for conducting hotel and other related business for furtherance of business or commerce against license fee, hence the appellants are liable for payment of service tax under "Renting of Immovable Property Service" w.e.f. 1-6-2007. Accordingly, proceedings were initiated by issue of a SCN dated 17-3-2014 wherein inter alia, service tax liability of Rs. 3,21,94,224/- under the category of Renting of Immovable Property Service for the period 2009-10, 2011-12 and 2012-13 was proposed to be demanded with interest thereon. SCN also proposed imposition of penalties under Sections 76, 77 & 78 of the Finance Act, 1994. In adjudication, the Commissioner vide impugned order dated 9-3-2015 confirmed demand of Rs. 2,51,85,330/- with interest thereon, imposed equal penalty under Section 78 ibid and also imposed penalty under Section 77(1) and 77(2) ibid. Aggrieved the appellants are before this forum.

2. Today when the matter came up for hearing, on behalf of the appellant, Shri Sachin Chitnis, Ld. Advocate made oral and written submissions which can be

broadly summarized as under :-

(i) In the definition of "Renting of Immovable Property Services" under Section 65(105)(zzzz) of the Finance Act, 1994, immovable property buildings used for the purpose of accommodation including hotels are not included within the scope of the definition. Hence license fees received by the appellant from IHCL is not chargeable to service tax under the head "Renting of Immovable Property Service".

(ii) The main object of agreement between the appellant and IHCL is to assign entire business of the hotel to IHCL and not for renting of immovable property. The license fees is received by the appellant as a percentage of net sales. Hence transaction between the appellant and the IHCL is of sharing of business profit and not merely renting of immovable property.

(iii) Permitting the usage of hotel property and giving the hotel property for running the hotel is incidental to the assigning of running the entire hotel business and by applying the predominance test, it is the assigning of the entire hotel business for conducting which is the predominant activity. Permitting usage of property is merely incidental, which cannot be taxed separately based on the ratio of following judgments :

(i) Dr. Lal Path Lab. - 2006 (4) S.T.R. 527 (T) upheld by P&H - HC- 2007 (8) S.T.R. 337 (P&H)

(ii) B.E. Gelb Consultancy - 2009 (14) S.T.R. 241 (T)

(iii) N. Rajashekar & Co. - 2008 (12) S.T.R. 760 (T)

(iv) Jai Mahal Hotels Pvt. Ltd. - 2014 (36) S.T.R. 669 (T)

(v) Ambience Constructions India Ltd. - 2013 (31) S.T.R. 343 (T)

(vi) Paradise Mehak Properties Pvt. Ltd. - 2013 (32) S.T.R. 236 (T)

(vii) Orient Express Co. Ltd. - Stay Order No. ST/SO/55044/2013 -CU (DB), dated 28-12-2012 passed by CESTAT-Delhi

(viii) Paradise Mehak Properties - 2014-TIOL-2156-CESTAT-Del.

(iv) The issue has been settled by the Tribunal in the following cases :

S. Nos.

Case Laws

1

Ambience Constructions - 2013 (31) S.T.R. 343 (T)

2

Jai Mahal Hotels - 2014 (36) S.T.R. 669 (T)

3

Paradise Mehak - 2014-TIOL-2156- CESTAT-DEL

4

The Lake Palace Hotel - 2016-TIOL2140-CESTAT-DEL

5

Orient Express Co. Ltd. - 2016-TIOL3227- CESTAT-DEL

6

Ex Maharani Mahendra - 2017-TIOL2072-CESTAT-DEL

The ratio of the above cases are squarely applicable to the present case, as licensee in all the above cases (except in Ambience Constructions (supra) is IHCL and the license agreement in all these cases are worded similarly.

(v) As an alternative plea, the proceedings per se are hit by limitation. In response to a letter dated 9-11-2005 issued by the Superintendent, SIV Chennai, the erstwhile owners SHIL vide their letter dated 15-12-2005 had given the information sought and also attached balance sheets for the years 2003-04 and 2005-06. Vide a further letter dated 26-6-2006, the Superintendent (SIV), Chennai requested for copies of the license agreement dated 20-3-1984 entered into between SHIL and IHCL, details of license fee received from IHCL during the years 2003-04, 2004-05 and 2005-06, details of service charges received for the same period and details of payment made to holding company namely Spencer & Co. All these required details were submitted by letter of SHIL dated 26-6-2006. Although all the information had been submitted, the SCN was issued only on 17-3-2014 for the period 2009-10 to 2012-13. Based on the same agreement dt. 27-6-1984 between SHIL and IHCL and subsequent agreement dated 18/2010 entered into between SHIL and the appellant hence the entire proceedings are hit by limitation.

(vi) The present case involves interpretation of provisions and further appellant had provided all the details sought for by the department. In the circumstances, the imposition of penalties cannot be sustained.

5.2 From an analysis of the above definitions, in our opinion, to fall within the taxable entry of "renting of immovable property", the immovable rented out should be the genre exemplified in Explanation 1 reproduced supra. In the present case, however, the agreement between the appellant and IHCL is not merely for renting of the hotel or land appurtenant thereto etc., but is "license to run, conduct and operate Connemara hotel together with all the related facilities and business appertaining thereto". It appears to reason that not just the immovable property portion of the hotel, but also, the employees and other staff, goodwill and other paraphernalia are also taken into consideration by the two parties involved while framing the license agreement. It is also relevant to note

that there is no "fixed rent" that is payable as would be expected in a normal renting of immovable property transaction. On the other hand, the consideration for license to run, conduct and operate the hotel is a "license fee" equivalent to 15%/20% of the annual sales from the operation of the hotels. This being so, the license fee that would accrue to the appellant is only a percentage of the turnover. Since the turnover is never static but is dynamic and will go up or down in every succeeding year, the "lease license fees" would also wax or wane in resonance. The license fees are accruing to the appellants therefore have an umbilical cord relation with the turnover and profits of the hotel business under IHCL. In our view therefore, the transaction between the appellant and IHCL is definitely not one of "renting of immovable property" but a business transaction between the two, where the consideration is not like a regular rent but is dependent on the annual performance and profits of the hotel.

5.3 We find that the same view has been reiterated in a number of Tribunal's decisions cited by the Ld. Advocate (supra)."

(emphasis supplied)

17. The above decision of the Tribunal in the case of Grand Royale Enterprises (supra) was affirmed by the Hon'ble Supreme Court vide judgment dated 01.08.2022 in Civil Appeal No. 7326/2019, as reported in 2022 (63) G.S.T.L. 412 (S.C.). The Apex Court observed as under:

"2. Having gone through the impugned judgment passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) and the reasoning given, no interference of this Court is called for. The Civil Appeal stands dismissed."

18. After analysing the facts, evidence and applying the decision in the case of Grand Royale Enterprises as affirmed by the Hon'ble Apex Court, we are of the considered opinion that the demands cannot sustain.

19. In the result the impugned order is set aside. The appeal is allowed with consequential reliefs, if any, as per law.