IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL PRINCIPAL BENCH : NEW DELHI

Date of Hearing : 14.06.2018
Date of Decision : 17.12.2018

APPEAL Nos.ST/57835/2013-DB

(Arising out of Order-in-Appeal No.05/ST/Appeal/DLH-IV/2013 dated 27.02.2013 passed by the CCE (Appeals), Delhi-IV, Faridabad]

M/s.Ambience Hospitality P. Ltd. **Appellants**

Vs.

CCE, Delhi-IV **Respondent**

Appearance:
Shri P.K. Sahu, Advocate for the Appellants.
Shri A.K. Singh, DR for the Respondent.

CORAM:
Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Shri C.L.Mahar, Member (Technical)

FINAL ORDER No.53429/2018

Per Anil Choudhary

The brief facts of the case are that the appellant vide Agreement of Sale/Purchase dated 8.12.2003 with Ansal Properties & Ind. Ltd., acquired possession of club building with the land apartment thereto (in bare shell condition) located at Block –B, Sushant Lok, Phase-I, Gurgaon for the purpose of developing and running a club. Thereafter, the appellant took effective steps to furnish and start the club.

On 10.03.2004, the Appellant (Ambience Hospitality Pvt. Ltd.) (AHPL for short) entered in "Agreement of Joint Venture" with another company viz.

Ambience Hospitality Management (P) Ltd. ('AMPL' for short), for running the club on "Revenue-Sharing Basis'. As on 10.03.2004, the club known as "The Palm Town & Country Club', which was fully furnished with plant, machinery, furnitures, furnishings and other operating equipments provided by the appellant.

2. The salient features/clauses of the Agreement are –

> *"2.3 The Second Party (AMPL) shall use the name and logo of the Club or its name and logos for the operation of the Club, as appropriate, for the marketing, and sale of membership or other items to members, guests or third parties using the club (or any part thereof) and for any other purpose connected to operating running and maintaining the club.*
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> *2.4 The First Party agrees that it shall be responsible to provide the land on which the Club shall be built, construct the Club and provide the Plant & Machinery, Furniture, Furnishings and Equipment and Operating Equipment, all as per the Plans and Specifications which shall be mutually agreed upon with the Second Party and shall also be responsible for all major repairs and maintenance to the above.*
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> *2.5 The Second Party agrees that it shall be responsible for operating and managing of the Club, providing of the Operating Supplies, hiring of employees, paying of their wages and meeting all their statutory payments etc.*
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> *3.2 The First Party confirms that it shall by 31st March, 2005 in conformity with the Plans and Specifications, complete the installation of all Plant & Equipment, Furniture, Furnishings and Equipment and Operating EQuiment in respect of Phase II*

at the site more particularly set out in Schedule I attached hereto and the Second Party will extend full co-operation to the First Party in completing the works.

3.3. The First Party agrees that it shall hand over possession of the Club to the Second Party on or before 30th September, 2004 for the purpose of operating and maintaining the Club in accordance with this Agreement. However, it is agreed by the Parties that the Second Party shall have the right to grant memberships from the execution of this Agreement. The First Party further agrees to take all appropriate actions required to assure such quiet and peaceful operation and maintenance by the Second Party.

3.4 The Second Party will arrange for the requisite Working Capital, as provided for in Clause 10.2, necessary to enable the Second Party to operate and maintain the Club.

3.5 The Second Party warrants to the First Party that it has the technical knowledge and expertise required for the operation, management and maintenance of a first class private club.

5.3 All Pre-Opening Expenses shall be borne and met by the Second Party (AMPL). Such pre-opening expenses shall include but not be restricted to pre-opening salaries and wages, training expenses, food trial expenses, promotional and advertising expenses including cost of promotional material, cost of licenses and permits required for operations, cost of opening functions and parties.

6.1 This Agreement shall become effective from the date of its execution. The initial Term of Agreement shall be for a period of

twenty five (25) years commencing on the date of handing over of possession of the Club.

7.3 The Second Party will meet the entire expenses of running and managing the Club from its share of revenue. Any profit or loss accruing from the business of running and managing the Club will accrue to the Second Party. All liabilities and responsibilities will be that of the Second Party and the First Party will not be responsible for any liability for any default or lapse by the Second Party in running and managing the Club.

9.1 In consideration of the First Party collaborating with the Second Party for management of the Club pursuant to this Agreement, the Second Party shall share a percentage of the revenue earned during a month from the following item, whichever is higher (hereinafter referred to as "the Revenue"):

Sl. No.	Nature of Revenue	%of Revenue sharing for the First Party AHPL	%of Revenue sharing for the Second Party AMPL
1	Membership Fees	50%	50%
2	Sub-licensing of areas	50%	50%
3	Annual Subscription Fees	30%	70%
4	Room Rent	30%	70%
5	Sports & Recreation	30%	70%
6	Sponsorship Fees	10%	90%
7	Food & Beverages	10%	90%

It is agreed by the Parties that in "calculating the Revenue" payments made to credit card companies, staff tips, outgoings/payouts shall not be included. The above revenue payable to the First Party shall be paid in Indian Rupees at the amount stated, subject to deduction at source of those elements of income tax, prescribed under the Income Tax Act of 1961.

9.2 The Share of Revenue is payable with effect from the date of this Agreement and shall be paid until the expiry of this Agreement or sooner termination in accordance with Clause 16 hereof and shall be payable by the Second Party to the First Party within ten (10) days from the end of each month.

15. The Second Party may terminate this agreement at any time by giving a written notice of 3 months.

3. Thereafter, Membership opened in April, 2005 and club starting functioning club was granted liquor licence in July, 2005.

4. That vide Supplemental Agreement date 17.03.2007, between Appellant –AHPL and AMPL, some terms of J.V were modified , particularly as to "Sharing of Revenue" . Clause 9 of 9.0 Agreement was substituted as follows.

7.1 The Parties agree to amend Clause 9 of the Joint Venture Agreement by substituting it with the following clause:

> *"In consideration of AHPL collaborating with the Company for management of the Club pursuant to this Agreement, the Company agrees to pay the following consideration to AHPL;*

a. Rs.1,45,00,000/- shall be paid by the Company to AHPL for the period 1st April, 2005 to 31st March, 2006 in the manner as decided mutually between the parties. However, with effect from 1st April, 2006, Rs.18,00,000/- per month shall be paid by the Company by way of lease rental on monthly basis and for this purpose, the parties shall enter into a lease deed for the lease of the Club Premises.

b. Rs.2,00,000/- per month shall be paid by the Company in consideration of AHPL providing all the initial kitchen equipments, furniture, fixture and fittings with effect from 1st April, 2006 by 15th of every month. However, 50% of the amount paid under this clause shall be apportioned towards provision of kitchen equipments and the balance of 50% shall be apportioned towards the provision of furniture, fixtures, fittings, etc. by AHPL.

c. The minimum consideration of Rs.2,00,000/- per month under this Agreement will be increased by 6.27% per annum with effect from 1st April, 2007.

d. The Company will pay AHPL an interest free security deposit of Rs.22,00,000/-. It is agreed by AHPL that the said security deposit shall be adjusted on the expiry of the term of this Agreement or if this Agreement is terminated prior to its expiry, then the security deposited shall be refunded.

5. During the period, June 2007 to March, 2009, appellant paid service tax considering the said leasing activity as Renting of Immovable Property Services. Thereafter, the appellant filed a refund claim on 23.03.2010, claiming refund of tax so paid on the ground that lease of club (a business) does not fall in the

meaning of word 'immovable property' under Section 65 (105)(zzzz) of Finance Act, 1994, inasmuch as clause (d) of the exclusions term, definition of 'Immovable Property' excludes building used solely for residential purposes & building used for the purposes of accommodation including hotels, boarding house, holiday resort, tents, camping facilities. It had been claimed that the club consisted of club rooms & restaurants, bars & banquet rooms & other public rooms, recreational facilities including gymnasium, aerobics, locker room etc. for the use of its members.

6. Adjudicating Authority rejected the claim after holding that the club leased by the appellant fell in the definition of Immovable Property, inasmuch as the club provided miscellaneous service to only its members and their guests as a multiple use building and is not akin to a hotel. It was also held that the claim for Rs.11,81,473/- was only filed within the limitation period and the rest was barred by the limitation period.

7. The learned Commissioner (Appeals) upheld the OIO after observing that the club was a multiple use building and was rightly covered under the service tax net under renting of immovable property. It was also held that miscellaneous services provided by the appellant were available only to its members and their guests and for this purpose the remuneration was not enough, but the membership of club was also essential, whereas in the case of a hotel, the services are available to everyone who pays remuneration for it and hence in the instant case, the club

was not akin to a hotel. It was also held that part of refund claim was barred by limitation.

8. Appellant have filed their appeal before this Tribunal on the ground that the club did not fall in the definition of immovable property and that the claim was not barred by limitation. In the application for additional grounds of appeal, it has been submitted that the appellant has given the club as a running business (Joint Venture) and that, the service tax was not payable on running of business, or running the club in Joint Venture.

9. The Ld. Counsel for the Appellant submits that Renting of Immovable Property was brought into service tax net by Finance Act 2004 w.e.f. 01-06-2007 under section 65 (105) (zzzz) which reads as under'

Section 65 Definitions-In this chapter, unless the context otherwise requires-

> **(90a)** "renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include-
>
> i. Renting of immovable property by a religious body or to a religious body; or
> ii. Renting of immovable property to an educational body, impartial skill or knowledge or lessons on any subject or filed, other than a commercial training or coaching centre.
>
> Explanation 1.- For the purpose of this clause, " for use in the course or furtherance of business or commerce" includes use of

immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings;]

(105) “Taxable Service” means any service provided or to be provided

(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. 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,

but does not include-

a. Vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining pruposes;
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, tents, camping facilities.

10. The appellant have claimed that their case falls in exclusion (d) which applies to buildings used for purpose of accommodation including hotels etc. In the refund application, it was submitted that the club consists of club rooms & restaurants, bars and banquet rooms etc. for the accommodation and use of its members. The said contention of the appellant remains unrebutted. However the appellant's contention has been brushed aside on the ground that the club is a multiple use building and the service provided by the club were available only to members and their guests. The said contention of lower authorities is not tenable in as much as it is not in dispute that club provides the rooms available for stay of its members and for their guests. It may be held that facilities provided by the club were akin to the facilities provided by the hotel.

11. Ld. Counsel places reliance in the case of **M/s Spun Casting & Engg. Co. Pvt. Ltd. vs Dwijendra Lal Sinha (Dead)** reported in **(2005) 6 SCC 265** and **K.V. Jai Singh vs. C.R. Govindaswamy Chettiar (1996) 4 SCC 761.** In both the cases the court had been analyzing provisions relating to Rent Control Act. It had been observed that Renting of Immovable Property was different than Leasing of Business itself. In support of the contention that it is a case of Leasing of Business and not the leasing of Immovable property, appellants submitted copies of the liquor licence dated 21.07.2005, which had been granted to the appellant and was being used by the lessee or co-venturer. Appellant also submitted a list of members who became the members of club prior to the said lease deed dated 10.3.2004 and continued to be the members of club even afterwards; they enjoyed the facilities of the club. It is therefore clear that it was a

case of leasing of business and not the case of Leasing of Immovable Property only.

12. From the perusal of refund claim it may be noted that the said club is fully furnished including plant & machinery, furniture, furnishings and other operating equipments. There is no dispute about the said facilities in club. The contention of the appellant that it is not a case of simple leasing of immovable property but it is a case of leasing of entire business of club to the lessee under Joint venture. On this ground also, the club doesn't fall in the definition of immovable property.

13. On the issue of limitation, the appellant have claimed that it had paid the so called taxes under mistake of law and it is fully entitled to the refund of same. Appellant have relied on various decisions on the issue:-

i) In the case of **Union of India vs ITC Limited reported in 1993 (67) ELT (SC);** the Hon'ble Supreme Court has upheld the view by Delhi High Court that 'the duty of excise is that which is levied in accordance with law and that any money which is realized in excess of what is permissible in law would be a realization made outside the provisions of the Act.'

ii) Similar view has been taken by Hon'ble Karnataka HC in case of **K.V.R Constructions v CCR Bangalore 2010 (17) STR 6** it had been held that 'once it is admitted that amount paid by the assessee is not a duty but deposit, there is no necessity of making the calim by invoking

section 11B of the Act. The Department wrongly assumed that section 11B of the Act was applicable in the present case. The High Court held that the order for rejecting the refund claim beyond the period of limitation is unsustainable and thus quashed and directed that the refund should be granted forthwith.

14. In view of above, it is prayed that the appeal may be allowed.

15. Opposing the appeal, ld. AR for Revenue states that the Department has taxed AHPL to service tax for renting of immovable property and not AMPL, which is maintaining and running the club. He further refers to para 5 of the Lease Deed dated 22.05.2007 between the AHPL and AMPL, which reads as follows:-

> *"5. In lieu of grant of the Lease by the First Party to the Second Party, the Second Party undertakes to pay a monthly rental of Rs.18,00,000/- (Rupees Eighteen Lakhs only) till 31st March, 2007. Thereafter, the rent shall be increased by 6.27% annually. The second party shall pay the agreed rental charges to the First Party by the fifteenth day of each next English Calendar Month. In case of delay in payment of rent by the Second Party an interest calculated @12% p.a. shall be paid by the second party to the First Party for the p*eriod of delay."

16. Thus, it is evident that the appellant, AHPL was receiving monthly rental of Rs.18 lakhs from AMPL being the agreed rental charges per month. Further, referring to the provisions of Joint Venture Agreement dated 10.03.2004, he states

that it is evident that club was yet to be built and developed. Hence, the appellant's contention that the running of club was handed over to AMPL is not proved.

17. Further, Ld.AR referring to para-7.1 (b) of the Supplemental Agreement dated 17.03.2007 states that it is abundantly clear that 50% of the amount i.e. Rs.1 lakh was being paid to AHPL for the kitchen equipments and another 50% i.e. Rs.1 lakh was being paid for the furniture, fixtures and fittings, which includes several items as per Appendix-A of the Joint Venture Agreement. Thus, Rs.18 lakhs mentioned in Clause 7.1 (a) of the Supplemental Agreement or Rs.18 lakhs p.m. was being paid by way of rental for providing the building and space for the club only. Thus, it is apparent that the club was develoed/built by the appellant, AHPL, after they entered in agreement with AMPL for running of the club.

18. Further, ld. AR contends that the appellant has not disclosed the receipt of Rs.1.45 crores, which was paid to them by AMPL and not provided the documents to the Department at the adjudication level like the Joint Venture Agreement and the Supplemental Agreement. Further, he contends that there is no where written in the agreement that a running club is being handed over to AMPL by the appellant. He further contends that part of the refund claim was time barred.

19. Having considered the rival contentions and on perusal of records, we are satisfied that the appellant has been running the club by way of Joint Venture with AMPL, on principle to principle basis. This is evident from first Joint Venture Agreement entered into between the parties dated 10.03.2004. In this agreement from the Revenue Sharing Formula and the mutual covenants as agreed between

the parties, it is crystal clear that the appellant and AMPL intended to do the business of running of club on principle to principle basis. We further hold that the subsequent modification of the Revenue Sharing Clause between the parties does not change the colour and reduce the arrangement between he parties as that of landlord and tenant. In principle, the appellant has not delivered the possession of club to AMPL by way of tenancy but has only given the right to manage and operate the club for their mutual benefit, on principle to principle basis. Accordingly, we hold that the provisions of Service Tax are not attracted. We further hold that there is no application of Section 11 B of the Central Excise Act in grant of refund, in the facts of the present case following the precedent ruling in the case of **Union of India Vs. ITC Ltd. – 1993 (67) ELT (SC).** A tax wrongly realized or paid on in excess of what is permissible in law, is a realization made outside the provisions of the Act. Such amount cannot be retained by Revenue, being in conflict with Article 265 of the Constitution.

20. Thus, the appeal is allowed with consequential benefit and the impugned order is set aside.

[Order pronounced on17.12.2018]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(C.L. MAHAR)
MEMBER (TECHNICAL)

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