

2020-TIOL-974-CESTAT-KOL

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL  
EASTERN ZONAL BENCH, KOLKATA**

**Appeal No.ST/75188/2019**

Arising out of Order-in-Appeal No. 533/S.Tax-I/Kol/2018, Dated 12.09.2018  
Passed by the Commissioner of CGST & Central Excise (Appeal-I), Kolkata

**Date of Hearing: 20.06.2019**

**Date of Decision: 20.06.2019**

**M/s ASIAN HOTELS EAST LTD  
HYATT REGENCY KOLKATA JA-I, SECTOR III, KOLKATA  
WEST BENGAL-700098**

**Vs**

**COMMISSIONER OF CGST AND CENTRAL EXCISE  
KOLKATA, 180, SHANTIPALLY, RAJDANGA, MAIN ROAD  
2ND FLOOR, KOLKATA-700107**

**Appellant Rep by:** Shri Ankit Kanodia, CA

**Respondent Rep by:** Shri D Halder, AC (AR)

**CORAM:** P K Choudhary, Member (J)

**ST** - The assessee is engaged in hospitality industry and is a five star rated hotel under the brand name of Hyatt Regency Kolkata and is thus registered with service tax department for providing services such as accommodation, rent a cab, restaurant and renting of immovable property - During verification of books of accounts of assessee, it was noticed that they had not paid the service tax on "renting of immovable property service" on the rent collected from M/s. AVIS, BSNL & Globe - A SCN was issued demanding service tax along with interest and for imposition of penalty under Section 78 - Assessee submitted that they were under bonafide belief that there was no service tax liability on the services of renting of immovable property as the same was under dispute until the amendment was brought in the statute - Therefore, they never disputed the liability and immediately paid the entire amount of service tax as calculated alongwith the applicable interest, which was also a substantial amount - It is his contention that since the entire amount was paid along with interest and therefore, there was no occasion for issuance of any SCN for imposition of penalty - The issue involved is no more res-integra in view of the decision of Tribunal in case of ***R.K. REFRESHMENT & ENTERPRISES (P) LTD. 2018-TIOL-817-CESTAT-DEL***

wherein the penalty on said service is waived - In view of said decision, the penalty imposed in impugned order is set aside: CESTAT

**Appeal allowed**

**Case laws cited:**

***Home Solutions Retail Ltd. v. Union of India - 2010-TIOL-818-HC-DEL-ST... Para 2***

***R.K. REFRESHMENT & ENTERPRISES (P) LTD. Versus COMM. OF C. EX., RAIPUR - 2018-TIOL-817-CESTAT-DEL... Para 5***

**FINAL ORDER NO. A/75901/2019**

**Per: P K Choudhary:**

The facts of the case in brief are that the appellant is engaged in the hospitality industry and is a five star rated hotel under the brand name of Hyatt Regency Kolkata and is thus registered with the service tax department for providing services such as accommodation, rent a cab, restaurant, renting of immovable property etc. During the course of verification of the books of accounts of the Appellant, by the Range office, for the period, October 2007 to January 2013, it was noticed that the appellant has not paid the service tax on "renting of immovable property service" for the said period on the rent collected from M/s. AVIS, BSNL & Globe amounting to Rs.348,656/-. On being informed for the said non-payment, the Appellant had paid an amount of Rs.3,48,656/- as service tax including cess and Rs.1,25,468/- as interest on 20/03/2013 and 22/03/2013 and communicated the same to the Department. Show-cause notice dated 22/04/2013 was issued demanding service tax along with interest and for imposition of penalty under Section 78. The Adjudicating Authority confirmed the demand of service tax of Rs.3,48,656/- and since the entire amount was already paid, he appropriated the same. He also confirmed and appropriated the interest amounting to Rs.1,25,468/-. Further, he imposed a penalty of Rs.3,48,656/-. On appeal, the Id. Commissioner (appeals) upheld the Order-in-Original and rejected the appeal. Hence the present appeal before the Tribunal.

2. The Ld. Counsel, Shri Ankit Kanodia, C. A. appearing on behalf of the appellant, submits that in compliance to the departmental observation for non-payment of service tax under "renting of immovable property service", the entire amount of service tax along with applicable interest was deposited and communicated to the Department along with challan copies. He further submits that there was no case for issuance of show-cause as there was no suppression on the part of the appellant. It is his submission that the appellant assessee was under the bonafide belief that there was no service tax liability on the services of renting of immovable property as the same was under dispute until the judgment of the Hon'ble Delhi High Court in **Home Solutions Retail Ltd. v. Union of India - 2011 (21) S.T.R. 109 (Del.) = [2010-TIOL-818-HC-DEL-ST](#)** by which amendment was brought in the statute. Therefore, they never disputed the liability and immediately paid the entire amount of service tax as calculated alongwith the applicable interest, which was also a substantial amount. It is his contention that since the entire amount was paid along with interest and therefore, there was no occasion for issuance of any show-cause notice for imposition of penalty. In support of his contentions, he relied upon the various decisions of the Tribunal.

3. The Id. D.R. appearing on behalf of the Revenue, justified the impugned order.

4. Heard both sides and perused the appeal records.

5. I find that the issue involved in this appeal is no more res-integra in view of the decision of the Tribunal in the case of **R.K. REFRESHMENT & ENTERPRISES (P) LTD. Versus COMM. OF C. EX., RAIPUR reported in 2018 (14) G.S.T.L. 281 (Tri. - Del.) = [2018-TIOL-817-CESTAT-DEL](#)**. The relevant paras of the said decision are reproduced below-

***"7. Other than above points, we note that there is a demand for Rs. 11,47,291/- under the category of renting of immovable property service. The appellants are not contesting the tax liability. They only requested for waiver of penalty invoking provisions of Section 80. The original authority declined to waive penalty on the ground that the appellants have not paid the Service Tax within the time mentioned under Section 80(2). We note that though the said sub-section was basically with reference to renting of immovable property service, the main Section 80 is still available to the appellant considering that the tax liability under renting of immovable service was subject matter of various disputes, amendments, including retrospective amendment. As such, the penalty imposed on this service is waived invoking provisions of Section 80."***

Also, it was held by the Hon'ble CESTAT in the case of

**SREE KANYACOMBINES Versus COMMISSIONER OF C. EX., VISAKHAPATNAM-II reported in 2016 (43) S.T.R. 604 (Tri. - Hyd.)as –**

**"5. I have heard the rival submissions. Undeniably the issue whether activity of renting of immovable property is subject to levy of service tax was a contentious one. In the present case, the value of taxable service of 'sale of space or time for advertisement' for the respective period is less than the threshold of exemption. The contention of the appellant that they bonafide believed that their services would not be taxable as renting of immovable property services was subject matter of litigation pending before the Apex Court is acceptable. It is also correct that sub-section (2) of Section 80 was inserted to avoid penalizing the assesseees as the matter was contentious one and there were several judgments in favour of assesseees also. The relevant portion of the Finance Bill in introducing sub-section (2) of Section 80 as quoted in the appeal is as under..... 6. It is seen that if the assessee fails to avail the benefit of sub-section (2) of Section 80, then the assessee has to be treated as though sub-section (2) of Section 80 did not exist.**

**It nowhere says that in case of failure to avail benefit under subsection (2) of Section 80, the benefit under sub-section (1) of Section 80 will be taken away. As per sub-section (1) of Section 80 if the assessee proves reasonable cause for failure, then no penalty shall be imposable.....**

**. In the case of Mahesh Vakatawarmal Rathod (supra), the Tribunal in a similar set of facts has set aside the penalty imposed under Section 76 of the Finance Act, 1994. In the present case, there is no allegation of fraud, suppression of facts or wilful misstatement. The service tax on renting of immovable property was not paid as the issue was contentious an there were decisions in favour of assessee also. Following the judgment laid in the case of Mahesh Vakatawarmal Ratho (supra), I hold that the penalty imposed under Sections 77 and 78 is not sustainable as the appellant has succeeded in establishing reasonable cause for the failure. In view thereof, the impugned order is modified to the extent of setting aside the penalties imposed without disturbing the confirmation of demand of service tax and interest thereon."**

6. I observe that the facts of the present case are squarely covered by the aforesaid decision of the Tribunal.

7. In view of the above discussions, the penalty imposed in the impugned order is set aside and the appeal filed by the appellant is allowed in the above terms with consequential benefit.

(Dictated and pronounced in the open court)

**(DISCLAIMER**

**: Though all efforts have been made to reproduce the order correctly but the access and circulation is subject to the condition that Taxindiaonline are not responsible/liable for any loss or damage caused to anyone due to any mistake/error/omissions.)**