2021-TIOL-825-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EAST REGIONAL BENCH, KOLKATA

Service Tax Appeal No. 75077 of 2019
& Cross Objection No. 75726 of 2019

[Arising out of Order-in-Appeal No. 488/ST-II/2018, Dated: 26.07.2018
Passed by Commissioner (Appeals) of CGST & Excise, Kolkata]

Date of Hearing: 27.08.2021
Date of Decision: 27.08.2021

COMMISSIONER OF CGST AND EXCISE,
KOLKATA NORTH, 180, SHANTIPALLY, RAJDANGA MAIN ROAD,
KOLKATA-700107

Vs

M/s ASIAN HOTEL EAST LTD
HYATT REGENCY KOLKATA, PLOT-JA-I, SECTOR III
SALT LAKE CITY, KOLKATA-700098

Appellant Rep by: Shri J Chattopadhyay, AR
Respondent Rep by: Shri Ankit Kanodia, Adv.

CORAM: P K Choudhary, Member (J)
Raju, Member, (T)

ST - The assessee was issued an SCN proposing certain tax demand - On adjudication, the demand was confirmed - On appeal, the Commissioner (Appeals) allowed partial relief, where the demand raised under Rule 6 of Cenvat Credit Rules, 2004 was dropped, with the remaining tax demand being sustained - The interest component and penalty was upheld too, with an option to the assessee to pay reduced penalty as per Section 78 of the Finance Act, 1994 - Hence the Revenue's appeal.

Held -
Regarding the Revenue's appeal on the issue of reversal of Rule 6 of Cenvat Credit Rules, 2004 on the abated value of Restaurant Services by taking the same as exempted services and applying 6% on the value of exempted services so determined to raise the demand of recovery of common Cenvat credit, it is seen that the issue is no more ***res-integra*** in view of CBIC's Circular No. **213/3/2019-Service Tax**, dated July 05, 2019 wherein it has been clarified by the board that there is no requirement of reversal under Rule 6 of the CCR, 2004 for provision of restaurant services. Thus, the Revenue's appeal to that extent is liable to be dismissed and we order to do so - Regarding imposition of penalty on the service tax paid by the assessee in course of audit before issuance of SCN, the lower authorities erred in sustaining penalty, considering settled principle that when tax is paid along with interest before issuance of SCN (other than cases of suppression or willful mis-statement), the Department cannot issue SCN in terms of section 73(3) of the Finance Act - Hence the Revenue's appeal is dismissed and the order of the Commissioner (Appeals) is modified to extent of deleting the penalty imposed: CESTAT

Revenue's appeal dismissed

Case laws cited:

POPULAR CATERERS Vs COMMISSIONER OF CGST, MUMBAI WEST - 2019-TIOL-1417-CESTAT-MUM... Para 3...Referred

FAIRFEST MEDIA LTD vs. CGST AND EXCISE KOLKATA SOUTH, - 2020-TIOL-1113-CESTAT-KOL... Para 3....Followed

DLF PROJECT LIMITED Versus C.C.E. & S.T., GURGAON-I - 2020-TIOL-870-CESTAT-CHD ... Para 3...Referred

ARCGATE Versus COMMISSIONER OF C. EX., JAIPUR-II - 2017-TIOL-2025-CESTAT-DEL ... Para 3 ...Referred

Santhi Casting Works v. CCE - 2009-TIOL-161-CESTAT-MAD ... Para 3 ...Referred

Commissioner of CGST, Howrah Vs. M/s. Kolkata West International City Pvt. Ltd - 2019-TIOL-2715-CESTAT-KOL ... Para 3 ...Referred

Bhoruka Aluminium Limited versus Commissioner of C. Ex. &ST. ,Mysore - 2016-TIOL-3060-CESTAT-BANG ... Para 3...Referred

Sen brothers Versus Commissioner of Central Excise, Bolpur - 2013-TIOL-1783-CESTAT-KOL ... Para 3 ...Referred

FINAL ORDER NO. 75799/2021

Per: P K Choudhary:

The demand was confirmed by the lower authority as proposed in the SCN. The Respondent filed an appeal before the first appellate authority who allowed the appeal of the Respondent to the extent of dropping the demand of Rs.65,82,774/- under Rule 6 of the CCR, 2004 and confirmed the demand of Rs.10,61,419/- along with interest and penalty with an option to pay reduced penalty @ 25% as laid down in proviso to Section 78 of the Finance Act, 1994.

2. The Revenue is in appeal against the above order of the first appellate authority to the extent of dropping of demand under Rule 6 of the CCR, 2004. The Revenue is also in appeal against the option of reduced penalty of 25% given by the Ld.Commissioner (Appeals). The Respondent has filed cross objection only for the penalty confirmed by the first appellate authority though Service Tax and interest have already been paid by the Respondent during service tax audit and they are not disputing it any more.

3. The Ld. Advocate appearing on behalf of the Respondent states that the departmental appeal to the extent of dropping of demand of Rs.65,82,774/- has become infructuous as the CBIC (vide CIRCULAR NO.**213/3/2019-Service Tax** , dated: July 05, 2019) has clarified that there is no requirement of reversal in case of Restaurant Services as below:

> ***"Subject: Provisions in the Cenvat Credit Rules 2004 regarding reversal of credit-***
>
> ***I am directed to draw your attention to the legal provisions regarding reversal of Cenvat credit in the case of services and to analyse some issues which have arisen in this context.***
>
> ***2.0 Issue: Is reversal under rule 6(3) of the Cenvat Credit Rules 2004 additionally required for all the services specified in notification 26/2012-Service Tax dated 20- 6- 2012."***

He further relies on the judgment of the ***M/s POPULAR CATERERS Vs COMMISSIONER OF CGST, MUMBAI WEST - 2019-TIOL-1417-CESTAT-MUM*** whereby in similar circumstances, the demand under Rule 6 of CCR, 2004 has been quashed.

Further as regards imposition of penalty on amounts already paid by the Respondent during the spot memo stage before issuance of SCN, the Ld. Advocate states that it is a settled principle that in case of payment before issuance of SCN, the SCN should not be issued in terms of Section 73 of the Finance Act, 1994. He relied upon the following decisions in support of his submissions :

> ***(a) M/s FAIRFEST MEDIA LTD vs. CGST AND EXCISE KOLKATA SOUTH, - 2020-TIOL-1113-CESTAT-KOL***

(b) DLF PROJECT LIMITED Versus C.C.E. & S.T., GURGAON-I 2020 (38) G.S.T.L. 56 (Tri. - Chan.) = 2020-TIOL-870-CESTAT-CHD

(c) ARCGATE Versus COMMISSIONER OF C. EX., JAIPUR-II (2017 (5) G.S.T.L. 281 (Tri. - Del.) = 2017-TIOL-2025-CESTAT-DEL

(d) Santhi Casting Works v. CCE [2009 (15) STR 2019 (Tri – Chennai)] = 2009-TIOL-161-CESTAT-MAD

(e) Commissioner of CGST, Howrah Vs. M/s. Kolkata West International City Pvt. Ltd. In FO No. 75640/2018 = 2019-TIOL-2715-CESTAT-KOL

(f) Bhoruka Aluminium Limited versus Commissioner of C. Ex. &ST. ,Mysore 2017 (51) STR.418 (TRI. - Bang.) = 2016-TIOL-3060-CESTAT-BANG

(g) Sen brothers Versus Commissioner of Central Excise, Bolpur 2014 (33) STR 704 (Tri. - Kolkata) = 2013-TIOL-1783-CESTAT-KOL

4. The ld.D.R. appearing on behalf of the Revenue, reiterates the grounds of appeal and agrees to the submission made by the Ld. Advocate as regards demand under Rule 6 of the CCR, 2004 is concerned.

5. Heard both sides through video conferencing and perused the appeal records.

6. As regards the departmental appeal on the issue of reversal of Rule 6 of CCR, 2004 on the abated value of Restaurant Services by taking the same as exempted services and applying 6% on the value of exempted services so determined to raise the demand of recovery of common Cenvat credit, we find that the issue is no more ***res-integra*** in view of CBIC's CIRCULAR NO **213/3/2019-Service Tax,** dated July 05, 2019 (supra) wherein it has been clarified by the board that there is no requirement of reversal under Rule 6 of the CCR, 2004 for provision of restaurant services. Thus, the Revenue's appeal to that extent is liable to be dismissed and we order to do so.

7. Next, as regards imposition of penalty on the amounts of Service Tax already paid by the Respondent during the course of audit before issuance of SCN, we find that both the lower authorities have erred in confirming the penalty as it is a settled principle that when tax is paid along with interest before issuance of SCN (other than cases of suppression or willful mis-statement), the Department cannot issue SCN in terms of section 73(3) of the Finance Act, 1994 which states as-

"(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the [Central Excise Officer] of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid……."

In the instant case of the Respondent, the Department has mechanically issued SCN alleging suppression of facts without according any reasons for such allegation. We find that the Tribunal in the case of ***M/s FAIRFEST MEDIA LTD vs. CGST AND EXCISE KOLKATA SOUTH,*** - **2020-TIOL-1113-CESTAT-KOL**, held as-

"5. I find that the present issue involved in this appeal is no more res-integra in view of the decision of the Tribunal in the case of Bhoruka Aluminium Limited Vs. CCEx. & S.Tax, Mysore reported in 2017 (51) STR 418 (Tri.Bangalore) = 2016-TIOL-3060-CESTAT-BANG The relevant paras of the said decision are reproduced below :

"4. The learned counsel for the appellant submitted that imposition of penalty under Section 78 of the Finance Act is contravention to the provisions of Section 73(3) of the Finance Act, 1994. He further submitted that service tax along with interest has already been paid by the appellant before issuance of show cause notice. He also submitted that Section 73(3) of the Finance Act, in unambiguous terms states that when an assessee has paid service tax either on his own or on the basis of the officer's ascertainment and informs the officer of such payment, then the said Section does not give any power to such officer to issue a show cause notice in respect of the tax so paid and such issuance of show cause notice is sans force of law and accordingly, not sustainable and tenable. The learned counsel relied upon the decision of this Tribunal in the case of South India Paper Mills Ltd. v. C.C.E. & S.T. reported in - 2016-TIOL-2294-CESTAT-BANG

wherein in the similar circumstances, the penalty under Section 78 of the Finance Act was dropped in toto. He also relied upon the following case laws :

(i) Intercontinental Consultants & Technocrats Pvt. Ltd. v. U.O.I. [2013 (29) S.T.R. 9 (Del.)] = 2012-TIOL-966-HC-DEL-ST

(ii) Amit Sales v. C.C.E. [2009 (13) S.T.R. 165 (Tri.-Del.)] = 2008-TIOL-1749-CESTAT-DEL

(iii) Jindal Saw Ltd. (IPU) v. C.C.E. [2013 (30) S.T.R. 490 (Tri.- Ahmd.)]

(iv) C.S.T., Bangalore v. Motor World [2012 (27) S.T.R. 225 (Kar.)] = 2012-TIOL-418-HC-KAR-ST

(v) Hindustan Petroleum Corporation Ltd. v. C.C.E., Mumbai-II [2012 (25) S.T.R. 161 (Tri.-Mumbai)]

(vi) C.C.E. & S.T., LTU, Bangalore v. Adeco Flexione Workforce Solutions Ltd. [2012 (26) S.T.R. 3 (Kar.)] = 2011-TIOL-635- HC-KAR-ST

(vii) Reliance Industries Ltd. v. Commissioner of Customs, Rajkot [2013 (287) E.L.T. 433 (Tri.-Ahmd.)].

6. On the other hand, the learned AR submitted that the appellant is guilty of suppression of facts as he failed to inform the Department regarding availment of irregular Cenvat credit and, therefore, the lower authority has rightly imposed the penalty under Section 78 of the Finance Act, 1994.

7. After considering the submissions by both the parties and perusal of the provisions of Sections 73, 76 and 78 of the Finance Act, 1994 and the judgments relied upon by the appellant cited supra, I find that Section 73(3) is very clear as it says that if tax is paid along with interest before issuance of the show cause notice, then in that case, show cause notice shall not be issued. In this case, I find that the contention of the appellant that he bona fidely believed that he is not liable to pay service tax but during the audit, the audit party informed him that he is liable to pay service tax, then he immediately paid the entire service tax along with interest. Except mere allegation of suppression, the Department did not bring any material on record to prove that there was suppression and concealment of facts to evade payment of tax. Consequently, in my opinion, the imposition of penalty under Section 78 of the Act is not justified and bad in law. Moreover, in the impugned order, the learned Commissioner (Appeals) has not recorded any finding on suppression of facts by the appellant with an intention to evade tax. In view of the above discussion, I set aside the impugned order by allowing the appeal of the appellant."

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

7. In view of the above, the impugned orders are set aside and the appeal filed by the appellant is allowed with consequential benefit."

8. We find that the facts of the present case are squarely covered by the aforesaid decision of the Tribunal. Thus, the appeal of the Revenue to the extent of imposition of penalty on the Respondent is also dismissed.

9. In view of the above, the Departmental appeal is dismissed in entirety and the order of the first appellate authority is modified to the extent of deleting the imposition of penalty. Cross objection is also disposed of in terms with the above directions.

(Operative part of the order was pronounced in the open Court)