

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. III

Service Tax Appeal No. 51002 of 2018

(Arising out of order-in-appeal No. 15(RK)/ST/JPR/2017-18 dated 29.01.2018 passed by the Commissioner (Appeals) and ADG, DGGSTI, JZU, Jaipur).

**Gurukripa Yuvraj Veg. &
Non-veg. Restaurant**

Hospital Road, Beawar,
District – Ajmer-305901, Rajasthan.

Appellant

VERSUS

**Commissioner and Additional
Director General**

DGGSTI (JZU), C-62, Sarojani Marg
C-Scheme, Jaipur -302005 (Rajasthan)

Respondent

APPEARANCE:

Sh. M. B. Maheshwari, C.A. for the appellant
Sh. S. K. Meena, Authorised Representative for the respondent

CORAM:

**HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)**

FINAL ORDER NO. 51093/2023

**DATE OF HEARING: 07.08.2023
DATE OF DECISION: 23.08.2023**

BINU TAMTA:

The present appeal has been filed against the Order in Appeal No. 15(RK)/ST/JPR/2017-18 dated 29.01.2018, whereby the demand for service tax under the show cause notice was affirmed.

2. The relevant facts as noted by the adjudicating authority are as follows:-

“3. Whereas acting on an intelligence that M/s Gurukripa Yuvraj Veg. & Non-Veg. Restaurant, Hospital Road, Beawar Dist. Ajmer is engaged in providing “Restaurant services” but is neither registered with the department not paying service tax, the Superintendent, Central Excise and Service Tax Range, Beawar visited the business premises of the M/s Gurukripa Yuvraj Veg. & Non-Veg. Restaurant, Hospital Road, Beawar Dist. Ajmer. It appeared that Restaurant is

engaged in providing taxable service viz 'Restaurant service'. Hence, the service provider was requested to get themselves registered with the department to pay service tax and also provide details of amount received on account of services provided by them during the period from May 2011 and onwards. Further the Superintendent Central Excise and Service Tax Range, Beawar vide his letter dated 07.09.2012 issued to the service provider asked them to provide the copy of Registration certificate obtained from State Excise department for bar license, Sales Tax Return/ Income Tax Returns, bill book, details of bank account for the financial year 2011-12. Since no reply was received the Superintendent, Central Excise and Service Tax Range, Beawar issued a summon dated 19.12.2012 with a request to provide the details/ documents related to Restaurant service provided by them during the period from 01.05.2011 to 31.08.2012. In compliance, Sh. Charan Pal Singh, proprietor of M/s Gurukripa Yuvraj Veg. & Non-Veg. Restaurant, Beawar is having State Excise Registration No. 119/2010-11 dated 14.07.2010. On being asked whether all terms and conditions of the Excise License issued by State Excise Department, Udaipur Rajasthan are being fulfilled by them it was stated that they were fulfilling all the conditions stipulated in their registration certificate. Further, on being asked whether condition of air conditioning facility was imposed mandatorily by the State Excise Department it was contended that no such mandatory condition was imposed. However, on the date of License i.e. 08.07.2010 air conditioning facility was available in their 'Restaurant -cum-Bar' but because of heavy electric bills, facility of air conditioners was removed and air cooling facility through air cooler was started by the end of year 2010 till 31.12.2012.

4. Whereas, as the service provider was contesting that there was no A.C. facility in his restaurant during or after 08.07.2010, an enquiry was conducted by the department from the office of the District State Excise officer and District Excise officer Ajmer informed that as per the policy of State Govt. in respect of granting & renewal of restaurant bar license during 2010-11 and 2011-12 the following conditions are prescribed:-

4.2.1 For renewal in 2010-11-

1. covered dining area should be 800 sq. feet with a sitting capacity for minimum 40 persons,
2. Restaurant must be fully air conditioned.
3. there should be separate toilet facilities for gents & ladies,
4. there should not be any room for staying of guests,
5. for renewal for 2011-12 annual turnover of a restaurant in 2010-11 should be Rs. 15 lacs or more in which billing amount of cooked food should be Rs. 10 lacs or more for which certificate from the assessing officer of Commercial tax department must be obtained.
6. Before renewal it is compulsory to deposit due tax on turn over assessed by commercial authorities in the Govt. account.

4.2.2 For new license of Restaurant & Bar in 2011-12-

1. covered dining area should be 1000 sq. feet with a sitting capacity for minimum 50 persons,
2. Restaurant must be fully air conditioned.
3. there should be separate toilet facilities for gents & ladies,
4. no room should be there for staying of guests,
5. Restaurant must be on 40 feet road
6. Turnover of a restaurant in last two years should be Rs. 15 lacs or more in which billing amount of cooked food should be Rs. 10 lacs or more for each year for which certificate from

the assessing officer of Commercial tax department must be obtained.

Further District Excise Officer, Ajmer (DEO) also provided copies of application for registration under State Excise Law with copy of application along with declaration dated 23.06.2010 submitted by the proprietor of notice. It is observed that in his application the proprietor of the said restaurant declared that the restaurant is air conditioned and turnover of more than Rs. 10 lakhs, License No. 119/2010-11 for the retail sale of Beer, ready to drink (R.T.D.) liquor and wine at restaurant was issued to the service provider.

On specific query whether the licensee submitted any intimation for removing the A.C. installed for adding another A.C. in the licensed premises, DEO replied that till date no comprises letter is submitted by the said party regarding removal or installation of air conditioner, moreover the committee comprises of departmental officers examined the declared facts and in routine the Excise Inspectors checks the licensed premises from time to time, too.

7. Whereas, it appears that the Service Provider has provided the services under the category of "Restaurant Service" defined under Section 65(105)(zzzzv) & is taxable under Section 66 till 31.12.2013 and thereafter under Section 66B of the Finance Act, 1994 and having a valid license to serve alcoholic beverages issued by the State Govt. Authorities. As per VAT Returns, service providers has received Rs. 1,49,23,237/- during 01.05.2011 to 31.03.2015 (For calculation of taxable turnover the amount as declared in VAT Returns for the full Quarter April to June 2011 has been taken since the assessee did not supply the same monthwise) from Restaurant Bar service and after granting Rs. 10 lacs exemption in terms of Notification No. 6/2005(ST) taxable values comes to Rs. 1,39,23,237/-. During the period from May 2011 to March 2015 the notice appears to have evaded service tax of Rs. 6,36,396/- under Restaurant service and the same appears recoverable from them in terms of provision to Section 73(1) of Finance Act, 1994 along with interest under Section 75 *ibid.*"

3. Accordingly, show Cause Notice dated 17/18.10.2016 was issued to the appellant, which was adjudicated by the Assistant Commissioner who confirmed the demand and the same was affirmed by the impugned order. The appellant has preferred the instant appeal before this Tribunal.

4. We have heard the learning Counsel for the appellant and also the authorised representative for the revenue and have perused the records of the case.

5. The issue involved herein is whether the services provided by the appellant would fall under the category of Restaurant-cum- Bar Service as defined under section 65(105)(zzzzv) of the Act and the appellant is liable to pay the service tax in respect thereof ?

6. Before adverting to the legal submissions it is necessary to examine the definition clause. The service tax on services provided by the Restaurant was introduced with effect from 01.05.2011 which is defined under sub-clause (zzzzv) of Clause (105) of section 65 of the Act which reads as under :-

"Taxable service means any service provided or to be provided, to any person, by a restaurant by whatever name called, having the facility of air-conditioning in any part of the establishment, at any time during the financial year, which has license to serve alcoholic beverages, in relation to serving of food or beverage, including alcoholic beverages or both, in its premises."

From 01.07.2012, the Restaurant Service is defined under Clause (i) of Section 66E specifies service portion in an activity wherein goods, being foods or any other article of human consumption, are supplied as part of activity, as a declared service. Clause (1) of Section 66E read as follows:

"Service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity."

7. We find from the records that subsequent to the inclusion of the services provided by the Restaurant having facility of air conditioning in the service tax net, letter dated 7.9.2012 was issued by the department calling upon the appellant to provide details of Registration Certificate, Bar licence, STR/ Income Tax Returns, bill books and bank account details for the financial year 2011-2012. The appellant in terms of summons dated 19.12.2012 appeared on 28.12.2012 and in his statement recorded under section 14 of the Act, stated that on 8.7.2010 when he obtained Bar licence he was having air conditioning facility in his Restaurant-cum-Bar but air conditioner

was removed and instead air cooling facility through air cooler was provided by the end of year 2010 till 31.12. 2012. We also find that on enquiry, copy of the application along with the declaration as submitted by the appellant for obtaining the liquor licence was produced by the State Excise Department which clearly mentioned that the restaurant is air conditioned. It also appears that the matter was verified by the Central Excise Officer as to whether the appellant had submitted any further communication for removing the air conditioning facility and instead providing air cooler facility at the restaurant, however the State Excise Officer vide letter dated 09.09.2012 informed that no such communication has been made by the appellant and also informed that the facts mentioned in their application for licence were duly verified by the Committee consisting of Departmental Officers and Excise Inspector and the premises is checked from time to time in routine. From this, it appears that the statement made by the appellant on 28.12.2012 was a mere cover up so as to avoid any service tax liability and there is no substantive proof in support thereof. On the contrary, it is on record that in the initial application made by the appellant on 23.6.2010 for availing the liquor licence the restaurant had air conditioning facility. There is nothing to rebut this documentary evidence and therefore the case of the appellant is not acceptable.

8. We also find that the revenue officials have fully investigated the case with the State authorities both on facts as well as on the legal aspect to ascertain the status of providing air conditioning facility in Restaurant-cum-Bar. As per State Rules/Conditions for

granting the Bar Restaurant licence, it was mandatory to have air conditioning facility for obtaining and also for renewal of Restaurant-cum-Bar licence and the licence granted to the appellant was renewed regularly during the period from 2011-12, 2012-13 and 2013-2014. The licence is currently valid which means that the appellant is still running the Restaurant-cum-Bar and as per the Restaurant Bar Licence policy and law of State Excise Department the appellant needs to comply with the conditions linked with the grant of licence as well as for the renewal of the licence and one of which is that air conditioning facility is provided therein. We do not find any perversity in the appreciation of the material on record and therefore, the plea taken by the appellant that they have dispensed with the air conditioning facility is not correct and needs to be rejected.

9. The appellant has cited several decisions in the written submissions on the point of extended period of limitation that there should be suppression or wilfull misstatement of fact with intent to evade payment of duty. There is no doubt on the principle enunciated in the said decisions, however we are of the view that in the facts and circumstances of the present case the appellant has tried to play fraud on two departments and have taken the plea which is beneficial to him with sole intent of evading the tax liability. We would refer to the observations of the Commissioner (Appeals) made in the impugned order:-

"8. I find that appellant had AC facility in 2010-11 but no AC facility was there in 2011-12 does not appear to be acceptable. The above admittance clearly shows intention of the appellant to defraud two Revenue Department at the same time, first to State Excise Department by violating the condition of license and getting the same renewed without fulfilling the criteria fixed in the Excise Policy and Second to Central Excise and Service Tax Department by not paying service tax on the pre-text that they were not having Air

conditioning facility, thus not liable to pay service tax. The appellant was morally duty bound to fulfill the conditions of the license issued by the State Excise Department otherwise to inform them regarding changes made by them at the time of shifting of Air conditioner facility. I therefore, find no infirmity in the findings of the Adjudicating Authority in the matter.”

10. On pure appreciation of evidence and material on record, we conclude that the extended period of limitation is clearly applicable as the appellant suppressed the correct fact with regard to the facility of AC being available at the restaurant and mis-represented and misguided the department with the sole intent to evade payment of duty. The intention to evade duty is writ large in the conduct of the appellant and it cannot be said to be a case of bonafide belief of non liability of service tax or a case of ignorance of service tax liability. For the said reasons, penalty under section 77(1)(a), 77(2) and 78 of the Finance Act,1994 are also confirmed.

11. The learned Counsel for the appellant has referred to an order in appeal No. 352(CRM)/ST/JPR/2019 dated 03.10.2019 in their own case relating to the subsequent period from April 2015 to June 2017 whereby the Commissioner (Appeals) accepted the statement of Shri Charanpal Singh, Proprietor dated 28.12.2012 as to the non availability of air conditioning in their restaurant and accordingly held the appellant to be eligible for exemption under Sr. No.19 of Notification No. 25/20.06.2012. Needless to mention that the order of the Commissioner is not binding on us and it is open to us to decide the issue on merits in accordance with law. As discussed above, the statement of the appellant does not inspire any confidence and cannot be relied upon, particularly when there is no documentary proof that the appellant had discontinued the functioning of the AC at their restaurant and informed the concerned departments. We, therefore do

not agree with the aforesaid order of the Commissioner (Appeals). Unless and until, the appellant is able to produce any cogent and substantive evidence in support of his statement that he does not have the AC facility in the restaurant, he is not eligible to claim the benefit of the exemption notification. The burden lies on the appellant to prove his case that he falls under the exemption Notification as there is no AC facility in his restaurant, which he has failed to do.

12. We, therefore do not find any infirmity in the impugned order which is hereby affirmed and the demand of service tax for the period from 01.05.2011 to 31.03.2015 alongwith penalty under Section 77(1)(a), 77(2) and 78 of the Finance Act, 1944 is upheld. Accordingly, the appeal is dismissed.

(Order pronounced on 23rd Aug. 2023).

(Binu Tamta)
Member (Judicial)

(P. V. Subba Rao)
Member (Technical)