CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70098 of 2021

(Arising out of Order-in-Appeal No.NOI-EXCUS-001-APP-809-20-21, dated -23/10/2020 passed by Commissioner (Appeals) CGST, Noida)

M/s Haldiram Snacks Pvt. Ltd. .....Appellant
(A-2, 3 & 4, Sector-65,
Noida, Uttar Pradesh 201301)

VERSUS

Commissioner, CGST & Service Tax, Noida ....Respondent

(4th Floor, C-56/42, Renu Tower,
Sector 62, Noida-201301)

APPEARANCE:

Shri S. Vyas, Advocate for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.-70967/2024

DATE OF HEARING : 28.11.2024
DATE OF DECISION : 28.11.2024

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-In-Appeal. NOI-EXCUS-001-APP-809-20-21, dated -23/10/2020 passed by Commissioner (Appeals) CGST, Noida.

2. The facts of the case in brief are that M/s Haldiram Snacks Pvt. Ltd., Noida are registered with the Central Excise Department for payment of central excise duty on various types of excisable goods namely mixed condiments & mixed seasonings falling under (CETH 21039040), ice cream & other (CETH 21050000), ready to eat packaged foods (CETH

21069099). The Appellant at the same address is also registered with the Service Tax Department (Centralized STC No. AAACH0061RST002) for payment of service tax due upon them on the restaurant services provided by the Appellant from its restaurant situated at 104 KM Mile stone, Mansurpur, NH-58, Distt. Muzaffarnagar, UP.

3. During the course of the audit of the records of the Appellant during September 2015 by the Officers of Central Excise & Service Tax (Audit), Audit II, Ghaziabad for the period from April 2013 to March 2015, it was observed that the Appellant is providing Restaurant services from the Restaurant having Air Conditioned facilities and have not been paying service tax on sale of food items by way of "Take Away"/"Pick Up" during the Financial Years 2013-14 & 2014-15.

4. The Show Cause Notice [1]dated 14.02.2017 was issued proposing to demand service tax amounting to Rs.23,92,414/- alongwith interest and also to impose penalty under Section 78 of the Finance Act, 1994. The Assistant Commissioner vide Order-In-Original No.08/CGST/AC/Division-III/Noida/2018-19 dated 22.03.2019, confirmed the demand as proposed in the SCN and also imposed penalty of equal amount under Section 78 of the Finance Act, 1994. Being aggrieved, the Assessee filed appeal before the First Appellate Authority and the learned Commissioner (Appeals), CGST, Noida, vide the impugned Order-In-Appeal, upheld the Order-in-Original dated 22.03.2019. Hence, the present appeal before the Tribunal.

5. Heard both the sides and perused the appeal records.

6. It is the case of the Appellant-Assessee that service tax on "Take away/Pickup Service" is not applicable as "Take away/Pickup Service" is mere sale of goods whereas the intent of the Statute is to tax the services provided in the Restaurant and in the absence of any service provided in "Take away/Pickup Service", Service Tax is not leviable.

[1] SCN

7. We find that the issue is no more *res-integra* and has been decided by the Tribunal in the case of **M/s Bikanervala Foods Pvt. Ltd. V/s Commissioner of CGST, Customs & Central Excise, Delhi-East vide Final Order No.55921 of 2024 dated 07.06.2024 in Service Tax Appeal No.50278 of 2019**. Relevant paragraphs of the order are reproduced below:-

> "6. The issue that arises in the present case is whether the activity of "Take Away" and "Home Delivery" tantamounts to taxable service under the category of Restaurant Service. We find that the issue is no longer res integra and has been decided by this Tribunal in the case of **Haldiram Marketing Pvt. Ltd. Vs. Commissioner of CGST, GST, Delhi East Commissionerate [2023 (71) GSTL 414 (Tri.-Del.)],** where the facts and circumstances are identical and hence, the present case is squarely covered by the observations made therein.
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> 7. In the case of **Haldiram Marketing Pvt. Ltd. (supra),** the brief facts noted are that they were engaged in running food outlets, where packaged food items could be purchased and also availed restaurant dining facilities. Additionally, the appellant there also provided the facility of "Take Away "of food items. On audit, it was noticed that the appellant was providing services in respect of "Take Away" orders by way of preparing and packaging food items for the customers. The Tribunal, after considering the provisions of Section 65 B(44) read with 66E of the Finance Act also considering the Circular No.334/3/2011- TRU dated 28.02.2011 and the clarification issued thereafter on 13.08.2015 that the transaction involving "Pick-up" or "Home Delivery" of the food items sold by the restaurants are not liable to service tax, being in the nature of sale only and no amount is charged for free delivery of food as the dominant nature of the transaction is that of sale and not service, as the food items are not served at the restaurant and there is no other element of service, which is normally offered at the restaurant. Referring to the earlier decision of the Madras High Court in **Anjappar Chettinad A/C Restaurant Vs.**

Joint Commissioner [2021 (6) TMI 226 – Madras High Court], where also, it was held that service tax would not be leviable in case of "Take Away" of food items. The relevant paragaraphs of the said decision are as follows:-

> "5. According to the petitioners, there is no liability for sale of food at the take-away counter or by parcel. They would state that the sale of packaged food constitutes pure trading activity and there is no component of service involved therein. They rely on the definition of 'service' under Section 65B(44), which excludes the transfer of title in goods by way of sale. In the light of this exclusion, parcel sales or take away food would stand outside the ambit of service tax.
> 6. According to them, in parcel sales, there could be no artificial splitting of transactions between one of 'service' and one of 'sale' with the attempt to bring the same under the purview of the former. The petitioners rely on letter bearing No.DOF 334/3/2011-TRU dated 28.02.2011 which had, according to them, clarified that service tax is not intended to cover sale of food that is collected or picked up for consumption elsewhere.
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> 26. Thus, not all services rendered by restaurants in the sale of food and drink are taxable and it is only certain specified situations that attract tax. The sale of food and drink simplicitor, services of selection and purchase of ingredients, preparation of ingredients for cooking and the actual preparation of the food and drink would not attract the levy of tax. Only those services commencing from the point where the food and drinks are collected for service at the table till the raising of the bill, are covered. This would encompass a gamut of services including arrangements for seating, décor, music and dance, both live and otherwise, the services of Maître D'Or, hostesses, liveried waiters and the use of fine crockery and cutlery, among others. The provision of the aforesaid niceties are critical to the determination as to whether the establishment in question would attract liability to service tax, and that too, only in an air-conditioned restaurant.
> 27. In the case of take-away or food parcels, the aforesaid attributes are conspicuous by their absence. In most restaurants, there is a separate counter for collection of the take-away food parcels. Orders are received either over telephone, by e-mail, online booking or through a food delivery service such as swiggy or zomato. Once processed and readied for delivery, the parcels are brought to a separate counter and are picked up either by the customer or a delivery service. More often than not, the take-away counters are positioned away from the main dining area that may or may not be air-conditioned. In any event, the consumption of the food and drink is not in the premises of the restaurant. In the aforesaid circumstances, I am of the categoric view that the

provision of food and drink to be taken-away in parcels by restaurants tantamount to the sale of food and drink and does not attract service tax under the Act.

28. The petitioners have brought to my notice several orders passed by the Appellate Commissioners stationed in Chennai and any other parts of the State who have taken a view that take away services would not attract liability to Service tax. (Order in Appeal No.445 of 2018 dated 28.09.2018 passed by the Commissioner (Appeals), Chennai, Order in Appeal No.147 of 2019 dated 25.03.2019 passed by the Commissioner (Appeals), Coimbatore and Order in Appeal No.16 of 2020 dated 23.03.2020 passed by the Commissioner (Appeals), Coimbatore. In some cases, I am informed that appeals have not been filed by the Department and thus the prevailing view, even within the Department is that there would be no service tax liability on take away food."

In view of the aforesaid observations, the Tribunal concluded that no service tax can be levied on the activity of "Take Away of food items as it amounts to sale and does not involve any element of service, inter alia, observing as under:-

> "19. It is seen that in case of take-away of food, the appellant sells the food/packaged items, as chosen by the customer, over the counter and this would amount to sale of goods. Services such as dining facility, washing area, clearing of the tables after the food has been eaten are, therefore, not involved. The activities of preparation of food and packing thereof by the appellant in case of take-away items are conditions of sale of such food, wherein the intention of the customer is to merely buy such packaged product from the appellant, and not to avail any restaurant services."

Since the facts of the present case are absolutely identical and give rise to the issue of taxability of sale of food items through "Take Away" or "Home Delivery", the activity is clearly of sale of food and does not involve any service element and, therefore, following the ratio of the judgements referred above, the activity of sale of food items by "Take Away" or "Home Delivery" by the appellant is not liable to service tax. Accordingly, the impugned order deserves to be set aside and the appeal is allowed.

8. In view of the above discussion, we find that the facts of the present case are squarely covered by the above mentioned decision. Accordingly, the impugned order is set aside

and the appeal filed by the Appellant is allowed with consequential relief, in accordance with law.

(Operative part of the order is pronounced in open court)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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