CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70392 of 2020

(Arising out of Order-in-Appeal No. 102-ST/APPL/LKO/2020 dated 28.05.2020 passed by Commissioner (Appeals), Customs, GST & Central Excise, Lucknow)

M/s Hotel Atithi **.....Appellant**
(Unit of M/s Four Brothers Hotel India (P) Ltd.,)
Fatehabad Road, Agra (U.P.) -282001.

VERSUS

Commissioner CGST & Central Excise **....Respondent**
113/4, Sanjay Palace, Agra-282002.

APPEARANCE:

Shri Aalok Arora, Advocate for the Appellant
Shri B. K. Jain, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 70202 / 2021

DATE OF HEARING/DECISION: 05.08.2021

ANIL CHOUDHARY:

The issue in this appeal is whether the appellant-assessee hotel, also providing restaurant service, whether they are liable to service tax on the food served in the rooms, under the head 'restaurant service'.

2. The appellant is engaged in providing short term accommodation in hotel as well as restaurant service. The officers of Central Excise & Service Tax, Audit Circle, Agra, conducted audit of the appellant's record on 24.10.2017 to 25.10.2017 for the period 2012-13 to 2016-17, and observed that the appellant did not pay service tax on

food supplied by them to their guest in hotel room. Show cause notice dated 14.05.2018 was issued invoking extended period of limitation.

3. The Assistant Commissioner, Central GST Audit Circle Agra vide order in original No. 24/Asst. Comm./Audit Circle/Agra/2018-19 dated 27.03.2019, after appreciating the facts & circumstances of the case and defence of the appellant, dropped the demand of service tax of Rs. 4,25,768/-.

4. The Commissioner, CGST & Central Excise, Agra vide order No. 04/Review/Agra/2019 dated 23.09.2019, reviewed the order dated 27.03.2019 of the Assistant Commissioner and filed appeal before the Commissioner (Appeals). The Commissioner (Appeals) vide order-in-appeal No. 102-ST/APPL/LKO/2020 dated 28.05.2020 allowed the appeal filed by the department and confirmed the demand of service tax Rs. 4,25,768/-.

5. Learned Counsel for the appellant urges that it is an admitted fact on record, the appellant had served food to guests in room of hotel, for which separate bill has been raised and VAT has been charged on value of food, as it is a sale of food, not service. It is submitted, the food is supplied from the kitchen of the hotel and not from the restaurant, and the appellant has raised bill for sale of food/goods, charging VAT, hence it is a sale and not a service. It is settled law that to justify an activity whether it is a sale or service, dominant aspect has to be seen and in present case, the dominant aspect is sale of food, therefore the activity does not fall under ambit of 'service', as such not liable to any service tax. In support of the contention, reliance is placed on the judgment of this Tribunal in the

case of **CCE Jaipur-I vs. Choki Dhani Resorts Pvt. Ltd., -2017 (50) STR 168 (Tri. Del.)**, wherein it has been held – payment of VAT to State Government on sale of food and beverages to customers indicating that supply of good was an independent activity, thus two taxes, i.e. VAT and service tax cannot be levied on same value.

6. He also urges that sale of goods (food) in the present case has been excluded from definition of 'service' under Clause (44) Section 65B of Finance Act, 1994, as such no service tax is leviable in the present facts and circumstances of the case, hence appellant is not liable for any service tax. Also relies on the judgement of Hon'ble Supreme Court in the case of **Vikas Sales Corporation vs. Commissioner of Commercial Tax -1996 (4) SCC 733**. Held - on sale of food where VAT is paid, the same is covered under Article 366 (29A) of the Constitution of India and out of ambit of service tax. It is further urged that Board's Circular No. 139/8/2011-TRU dated 10.05.2011, at Sl. No. 2, clarified when food is served in the room, it is not liable for service tax. Board Circular dated 7.10.2013 nowhere says that food supplied in room is liable to service tax.

7. It is further urged that the Coordinate Bench of this Tribunal (presided by me), in the case of **Lemon Tree Hotel vs. CGST, CE & Customs, Indore - 2020 (34) GSTL 220 (Tri. Del.)** have been held that the activity of sale of food and delivery to the customers in the hotel room, is sale and not a composite transaction as in the case of restaurant. Reliance was placed on the Board Circular dated 10.05.2011 (supra), wherein the Board have clarified that food served in the hotel room is not liable to service tax. It was further

held that for service of food in the hotel room, the said activity was not chargeable to service tax under the head 'restaurant service'. Considering the facts and circumstances, I find that the admitted fact is that the appellant hotel has not charged the consolidated amount towards room charges and food. For the food purchased by the room guest, VAT has been charged & paid. Service of food in the hotel room is similar to delivery of food from the hotel/kitchen counter, to the purchaser. I further hold that there is no element of service involved in delivering of food from hotel kitchen, to the guest in room. It is totally different from food served in the restaurant by the hotel, where in addition to the food the element of service is involved by way of music, quality of service, entertainment and overall ambience etc. Accordingly, learned Counsel for the appellant prays for allowing of the appeal.

8. Learned Authorised Representative appearing for the Revenue relies on the findings in the impugned order.

9. Having considered the rival contentions, I find that the issue is squarely covered in favour of the appellant by the Circular of the Board (supra) dated 10.05.2011. Accordingly, this appeal is allowed and the impugned order is set aside and order in original is restored. The appellant is entitled to consequential benefits, in accordance with law.

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

Sd/-

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

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