FAX : 0532-2400149 REGISTERED / AD

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 29/03/2017

To

Appellant as per address in table below

Respondent as per address in table below

Final Order No. A/70309/2017-SM[BR] dated 08/03/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.

Asstt. Registrar

Application	Appeal	Name and Address of Appellant
1	ST/1514/2011	**Sunder Lal Trikoti** Prop.m/.s Sunder Caterers Village-tirkot,post Office-talwari(burjola) CHAMOLI GARHWAL
		Name and Address of Respondent
2		C.C.E. & S.T.-Meerut-ii OPPOSITE SHAHEED SMARAK,DELHI ROAD,,BHANSALI GROUND, MEERUT, UTTAR PRADESH-

Copy To

3Advocate(s) / Consultant(s):

K. K. Sharma.
A-115, GROUND FLOOR, ASHOKA ENCLAVE, PART-II, SECTOR-37,
FARIDABAD,
HARYANA

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, REGIONAL BENCH : ALLAHABAD

Appeal No. ST/1514/2011-EX[SM]

Arising out of Order-in-Appeal No. 240-241/ST/MRT-II/2010 dated 26.07.2010 passed by Commissioner (Appeals), Customs & Central Excise, Meerut-II.

Sunder Lal Triloti ...APPELLANT

VERSUS

The Commissioner of Central Excise, Meerut-II ...RESPONDENT

APPEARANCE

Shri K.K. Sharma, Advocate for the Appellant
Shri Sandeep Kumar Singh, Deputy. Commr. (A.R.) for the Department

CORAM:

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

DATE OF HEARING & PRONOUNCEMENT : 08. 03. 2017
FINAL ORDER NO.-70309/2017

CUSTOMS EXCISE & SERVICES TAX APPELLATE TRIBUNAL
सीमा शुल्क उत्पाद शुल्क एवं सेवा कर अपीलीय अधिकरण
सत्यमेव जयते

Per Mr. Anil Choudhary :

The issue in this appeal is whether under the facts and circumstances, the appellant is providing the service of outdoor catering as contended by the Department or involved in trading, that is running a restaurant as contended by the appellant.

2. The brief facts are that, an agreement dated 01.04.2007 was signed between Shri 'Amar Singh Gill' the Honarary Secretary Boat House Club Ltd. Nainital and Shri 'Sunder Lal Contractor' that he will deposit Rs. 50,000.00 as security and Rs. 4,00,000.00 as club

AC

Commission for outdoor catering service, the caterer shall receive payment from the person to whom the supplies are made by cash or credit vouchers which will be submitted to the club, the club shall provide the staff, cutlery, crockery empty gas cylinders, deep freeze etc. as required and all the taxes and liabilities levied by the Government on the catering contractor, menu cards alongwith rates of the food articles will be approved by the committee of management of the club.

3. The learned Commissioner (Appeals) have observed as follows :

> *"(a) The club management has negotiate with the appellant to decide the terms and conditions of the service and then the said agreement was made. Thus it is considered that the service is personalized to the club and not to the members.*
>
> *(b) Although customers are free to choose the items of their choice from menu cards. But the food articles along with rates of the said menu card is not of the choice of the appellant but to be approved by the committee of management of the club. Thus it is considered that the club has decided the price, quantum, kind and manner in which food is to be served.*
>
> *(c) The timing of serving food and the place i.e. premises of the club is also as per the requirement of the club and not of the appellant.*
>
> *(d) The appellant has contended that they are paying VAT. The payment of VAT cannot convert the activity of service into trading unless and until it possesses the ingredients of trading. In fact, the appellant is collecting the amount including VAT from the visiting members of the club but ultimately transferred the same to the club and thus it is considered that the appellant is collecting the amount from the members on behalf of their client i.e. club".*

4. Accordingly the learned Commissioner (Appeals) have held that the appellant is providing outdoor catering service relying on the ruling of Hon'ble Supreme Court in the case of ***Tamil Nadu Kalyana***

Mandapam Association Vs. Union of India 2004(167) ELT 3, wherein the Hon'ble Apex court observed that the services rendered by outdoor caterers is clearly distinguishable from the service rendered in a restaurant or hotel, inasmuch as in the case of outdoor canteen service the food/eatables/drinks are the choice of the person who partakes the services. He is free to choose the kind, quantum and manner in which the food is to be served. But in the case of restaurant, the customer's choice of food is limited to the menu card. Again in the case of outdoor catering, customer is at liberty to choose the time and place where the food is to be served. Further, in the case of outdoor catering the customer negotiates each element of the service, including the price to be paid to the caterer.

5. The learned counsel appearing for the appellant urges that under the admitted facts in the present case also the menu card is prepared by the contractor-appellant and the same is approved by the committee of the club at the beginning of the contract period. Then onwards a fixed menu is available in the restaurant of the club and which is binding on both the appellant-assessee and the members and/or their guests visiting the club. Thus, the learned Commissioner have erred in his observations that the club or their members are free to choose their choice from the menu card but the food articles along with rates in the said menu card is not the choice of the appellant, but to be approved by the committee of the management of the club. The learned counsel further relied on the ruling of a Division Bench of this Tribunal in the case of ***Sky Gourmet Pvt. Ltd. Versus Commissioner of Service Tax, Bangalore 2009(14) STR 777***

(Tri.-Bang.) wherein under the fact that the assessee was engaged in sale and supply of food, beverage and dry stores to the airlines and they had not paid Service Tax on the gross amount received from the airlines. It was held that the supply of food/goods is/or sale of goods under Article 366 (29A) of Constitution of India. Food supplied under outdoor catering service is to be treated as sale of goods or foods. Service Tax is not payable on such value of goods/food once Sales Tax or VAT is levied and paid. Learned counsel also relied on the ruling of another Division Bench of this Tribunal in the case of ***LSG Sky Chefs (India) Pvt. Ltd. Versus Commissioner of Service Tax, Bangalore 2010(18) STR 37 (Tri.-Bang.)***, wherein under the fact that the assessee was engaged in the business of preparation and supply of meals and snacks to various airlines and also engage in packing and handling of food, loading and transporting of trolleys, storage, handling and set up of catering equipment, the appellant registered under the category of outdoor canteen service, discharge Service Tax liability on the entire amounts collected towards handling charges, delivery charges, hi-lift charges and bond handling charges but did not pay Service Tax on account of provision of meals/food items to the airlines. It was held that in view of the constitutional provisions the assessee was liable to pay Sales Tax on the food supplied and in view of the Hon'ble Supreme Court ruling in case of ***Imagic Creative Pvt. Ltd. Versus C.C.T. 2008(9) STR 337***, once the assessee paid Sales Tax on a portion of the value of the contract, then, simultaneously Service Tax could not be demanded as they were mutually exclusive. The Tribunal vacated the demand of Service Tax on the value of food items supplied by the assessee. The learned counsel further stated that it is the admitted fact that the appellant have paid Sales Tax/VAT on the sale of food items in the restaurant operated by him.

6. Learned A.R. for Revenue have relied on the impugned order and further drawn my attention towards the ruling of Hon'ble Supreme Court in Tamil Nadu Kalyana Mandapam Association (*supra*) and also relied on the provisions of the agreement between the appellant with the club and the findings of the learned Commissioner (Appeals).

7. Having considered the rival contentions, I find that the activity of the appellant is running a restaurant and as held in the case of Tamil Nadu Kalyana Mandapam Association (*supra*), the said activity is not classifiable under outdoor catering service. Further, as held by Division Bench of this Tribunal under the admitted facts that Sales Tax have been paid on the sale of food items in the restaurant and service tax is not leviable as Sales Tax and Service Tax are mutually exclusive. Accordingly, this appeal is allowed and the impugned order is set aside. The appellant is entitled to consequent benefits in accordance with law.

(Order was dictated in the open Court)

-Sd/-
(ANIL CHOUDHARY)
Member(JUDICIAL)

patel/-

प्रमाणित प्रति / Certified True Copy
03/04/17
सहायक पंजीकार / Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण / (C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001