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: 06/03/2018

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. ST/A/70447/2018-CU[DB] dated 10/01/2018

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/60779/2013	**Luxmi Enterprises** Safedabad,barabanki BARABANKI U.P
		Name and Address of Respondent
2		C.C.E. & S.T.-Lucknow 7-A...ASHOK MARG, LUCKNOW, UTTAR PRADESH-226001

Copy To

3Advocate(s) / Consultant(s):

**SUMIT WADHVA & DEVANG BHASIN(ADVOCATE & CONSULTANTS
R-1, 2ND FLOOR, PARK VIEW APARTMENTS, HAUZ KHAS ENCLAVE, NEW DELHI-110016**

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, Opp ICICI Bank of Defence Colony 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 Second Folder Copy 17 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD

COURT No. 1

APPEAL No. ST/60779/2013-CU[DB]

(Arising out of Order-in-Appeal No. 07/ST/LKO/2013 dated 11/09/2013 passed by Commissioner of Central Excise, Service Tax & Customs (Appeals), Lucknow)

M/s Luxmi Enterprises **Appellant**

Vs.

Commissioner (Appeals), Customs, Central Excise & Service TAx, Lucknow **Respondent**

Appearance:

Shri Sumit Wadhva (Advocate) Shri Devang Bhasin (Advocate) for Appellant

Shri Gyanendra Kumar Tripahti (AC) AR for Respondent

CORAM:

Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 10/01/2018
Date of Decision : 10/01/2018

FINAL ORDER NO. 70447/2018

Per: Anil G. Shakkarwar

Present appeal is arising out of Order-in-Appeal No. 07-ST/LKO/2013 dated 11.09.2013 passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Lucknow.

2. Brief facts of the case are that the appellants were providing food prepared in appellant's premises and supplying the same in boxes to the premises of Shri Ram

Swaroop Memorial College of Engineering and Management, Lucknow. Some correspondence was exchanged between Revenue and appellant. Appellant through letter dated 13.09.2010 informed Revenue that food was supplied to the said college as Tiffin service till financial year 2007-2008 and that food was prepared at appellant's premises, packed and supplied to hostel. Revenue entertained a view that the said activity was covered by definition of Outdoor Catering Service. Therefore, a show cause notice dated 28.09.2010 was issued to the appellant demanding service tax of Rs.2,41,587/- under the category of outdoor catering service for the period from 01.03.2006 to 31.03.2008. The said show cause notice was adjudicated through Order-in-Original dated 02.09.2011 wherein the learned Original Authority has held as follows:-

"From the above agreement, it is evident that the party has provided Tiffin service, i.e., packed food to the students of the institute, this food was not made in the mess/canteen or any space provided by the institute. Although, as per agreement, the food was prepared at the place of the party and the same was delivered on the basis of cost of food and no other charges were paid to the party by the institute during the tiffin supply period. The food was supplied @ Rs.1700/- per tiffin per month or Rs.1870/- per tiffin per month as the case may be agreed upon in the agreement.

The circular no. 332/82/97-TRU dated 24.09.1997 also clarifies that sale of food across the counter, as in fast food joints/restaurants or serving of foods in a restaurant/hotels do not fall within the ambit of outdoor catering, nor does mere free delivery (or delivery at a nominal cost to cover transportation charges) of food by a fast food joint, restaurant etc. shall be subject to Service Tax as in such cases there is no service element and only a mere sale of food.

The supply of food in Tiffin by the party to the institute may be termed as sale of food across the counter or mere free delivery. The allegation in the Show Cause Notice that preparation of food within the premises of the party and supply of the Tiffin packed food was not possible for a family to provide Tiffin Service in Tiffin Carriers for large number of persons at a time prescribed by the Institute is based on assumption and presumption and it is not supported by any evidence. Further, the notice failed to put forth any evidence as to what amount of manpower was engaged in making the said food and which premises was utilized for preparing the requisite quantum of food by the Party. Mere carrying a large quantity of Tiffin food packed by the Party at their own place and supplied to the Institute is not covered in the definition of Outdoor Catering Services and therefore does not fall in the ambit of Service Tax. The considerations received by the party *for supply of Tiffin packed food from the Institute cannot be held as value of taxable service.*

From the above I hold that the party has supplied tiffin packed food w.e.f. 01.03.2006 to 31.03.2008 on which no Service Tax was leviable, and therefore, the question of recovery of interest under Section 75, penalty under Section 76 and 78 Finance Act, 1994, does not arise.

As regard penalty/late fee for non submission of ST-3 returns I find that when the service provided by the party does not fall in the ambit of service tax no penalty is imposable under Section 70 of the Act ibid read with Rule 7C of the rule."

3. In view of the above findings the Original Authority dropped the demand. Aggrieved by the said order Revenue preferred appeal before Commissioner (Appeals). Learned Commissioner (Appeals) through impugned Order-in-Appeal has set aside the said Order-in-Original dated 02.09.2011 and confirmed the demand and imposed penalty of equal amount. Aggrieved by the said order appellant is before this Tribunal.

4. Heard, learned counsel for the appellant who has submitted that in many other cases under similar circumstances adjudication order passed were not reviewed and in their case the order passed by Original Authority was reviewed by Revenue. Further he ~~rely~~ relied on the Hon'ble Apex

Court's ruling in the case of Berger Paints India Ltd. vs. Commissioner of Income Tax, Calcutta reported at 2004 (165) E.L.T. 488 (S.C.).

5. Heard the learned AR who has supported the impugned Order-in-Appeal.

6. Having considered the rival contentions and on perusal of record we find that taking into consideration the terms of agreement, activities of the appellant and CBEC Circular dated 24.09.1997 referred by Original Authority, we find that Original Authority's order needs to be restored, since the same is sustainable. We, therefore, set aside the impugned Order-in-Appeal and restore the Order-in-Original dated 02.09.2011 and allow the appeal in above terms.

(Dictated and pronounced in Court)

Sd/-
(Archana Wadhawa)
Member (Judicial)

Sd/-
Anil.G. Shakkarwar
Member(Technical)

Ankit

प्रमाणित प्रति/Certified True Copy

13/03/18

सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण/C.E.S.T.A.T.
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38, M. G. MARG,ALLAHABAD-211001