CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2
Service Tax Appeal No.21937 of 2018

(Arising out of Order-in-Appeal No. CAL-EXCUS-000-APP-744/2018 dated 19.09.2018 passed by the Commissioner (Appeals) Central Tax, Central Excise and Customs, Kochi.)

M/s. Surya Catering Services
15/249, Kallipadam Kulapully Shoranur
Palakkad,
Kerala-679 122. **.... Appellant(s)**

VERSUS

Commissioner of Central Tax &
Central Excise, Calicut
C.R. Buildings, Mananchira
Calicut, Kerala-673 001. **.......Respondent(s)**

APPEARANCE:

Mr. M. Thirumalesh, Advocate for the Appellant
Mr. Rajashekar B.N.N, Superintendent (AR) for the Respondent

CORAM:

HON'BLE MR. P. A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MR. PULLELA NAGESWARA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 21022 /2026

Date of Hearing: 04.03.2026
Date of Decision: 03.09.2026

PER: P.A. AUGUSTIAN

The issue in the present appeal is regarding service tax liability on the Appellant under the category of 'outdoor catering services' for the period from 2011-12 to 2015-16.

2. The brief facts are the Appellant is engaged in catering services and registered under service tax under the category of 'outdoor Catering Services'. During verification of the records, it is found that Appellant failed to pay service tax as applicable. Accordingly, show

cause notice was issued on 28.11.2016 and Adjudication Authority as per the impugned order dated 28.03.2017 confirmed the demand along with interest and also imposed penalty. Aggrieved by said order, an appeal was filed before the Commissioner (Appeals) and Commissioner (Appeals) as per the impugned order dated 19.09.2018 rejected the appeal. Aggrieved by said order, present appeal is filed.

3. When the appeal came up for hearing, the Learned Counsel for the Appellant submits that the Appellant receives orders to prepare and provide catering services in functions such as marriages, birthdays, corporate events and like events. The Appellant prepares food at their location and at event location, sets up seating arrangements, tables, cooking and serving equipment, provides dedicated staff for service of food to the guests at the event location and paid Service Tax as applicable.

4. Learned Counsel submits that as regards other activities, Appellant receives orders for delivery of food at customer's location which is confined to preparation of food at the Appellant's location and delivering of food at the customer's location. The Appellant does not provide any other service at the customer's location such as waiters, furnishing and fixtures, linen, crockery and cutlery, etc. In respect of revenue model which is limited to delivery of food at the customer's location which is described as Catering charges received, the Appellant has not discharged the service tax on the ground that the said activity is a mere sale of food. As per the finding in the impugned order, prior to 01.07.2012, activities carried out by Appellant are falling under the classification 'caterer' under section 65(24) of the Finance Act,1944, since appellant used to supply food and food preparations, Adjudication Authority held that it is an 'outdoor caterer' under section 65(76a) of the Finance Act. 1944 as the appellant supplies food at a place other than their own and hence chargeable to service tax under section 65(105(zzt) of the Finance Act. 1944. After 01.07.2012, the Services performed by the Appellant by way of supplying ready to eat food and the activity involves significant element of service. Hence, Free Home

Delivery (FHD) is falling under purview of 'outdoor caterer' definition in erstwhile Service Tax law. Further as per the finding in impugned order, since the Appellant supplies food at customer premises, which is beyond the place of production of food, by virtue of Section 2(h) of the Central Excise Act, it does not constitute pure sale; whereas a service element, other than sale is involved in their activity of supply of foods at the premises of the customer.

5. Learned Counsel submits that as regards the demand confirmed by invoking extended period of limitation, Adjudication Authority held that, without the Audit being conducted by the department on the internal records of the Appellant the short payment of tax might not have come to light. The Appellant suppressed Free Home Delivery (FHD) income from the Department by misstating in ST-3 return if the intention of the Appellant was not malafide, the value of FHD could have been declared and indicated as exempted supplies in ST-3 return.

6. As regards the issue up to June 2013 and liability of the Appellant, Learned Counsel submits that the Appellant are not caterer and not providing service of catering at a place other than that belonging to the Appellant. Delivering the goods and causing the transfer of title at the point of time agreed is a service lacks substance and is unsustainable. Since it is the performance of work for the accomplishment of objective i.e. preparation of food for its supply. Assumption that preparation of food upon receiving the order is a service is unjustifiable. Such an assumption would render the activity of manufacturing the goods subsequent to placing an order by the customer as a service which is untenable, wherein the object is for the sale of manufactured goods being food which is a contract for sale of goods. Learned Counsel also drew our attention to the Explanation of relevant Clause of 65(105) which is as below:-

> (105):- Taxable service means any service provider or to be provided to any person by an outdoor caterer.
>
> ....

....

(zzt) to any person by an outdoor caterer;

....

7. Learned Counsel further submits that the objective of the contract executed between the Appellant and his customer is to deliver the ready to eat food at the customer's premises. Property in goods passes at the time when the parties to the contract intend it to be transferred. Title in goods is said to be passed to the buyer at the point when risk and rewards in the goods are passed and the buyer does not retain the right to reject the goods. In the instant case the title in the food will pass to the buyer on preparation of food and transportation is at the risk of the appellant. Hence all the expenses incurred by the Appellant in the course of transfer of title in food to the buyers is considered as sale of food and is liable to VAT, rendering levy of service tax unconstitutional. Thus, charges collected are not liable to service tax. Learned Counsel further submits that as per CBEC Circular No F. MO-334/3/2011 TRU dated 28.02.2011 it is clarified that mere sale of food by way of pickup or home delivery is not a service liable to tax.

8. Learned Counsel also drew our attention to the Circular dated 28.02.2011 where it is clarified that:-

> *"1.5. The levy is intended to be confined to the value of services contained in the composite contract and shall not cover either the meal portion in the composite contract or mere sale of food by way of pick-up or home delivery, as also goods sold at MRP. Finance Minister has announced in his budget speech 70% abatement on this service, which is, inter-alia, meant to separate such portion of the bill as relates to the deemed sale of meals and beverages. The relevant notification will be issued when the levy is operationalized after the enactment of the Finance Bill".*

9. Learned Counsel for the Appellant further submits that the Appellant were paying service tax as applicable and were filing ST-3

returns. Thus, the entire allegations are made based on the records maintained by the Appellant and in such cases, demand confirmed by invoking extended period of limitation and penalty are unsustainable.

10. Learned Authorized Representative (AR) for the Revenue reiterated the finding in the impugned order and submits that the manner of treatment of composite transactions, which in addition to a transfer of title in goods involve an element of provision of service has been laid down by the Hon'ble Supreme Court in the case of **M/s. BSNL - [2006(2)STR161(SC)],** as per which in the cases of works contract and service wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as part of the service the dominant nature test does not apply and service portion is taxable as a service. By following the principles laid down by the Hon'ble Supreme Court, these two activities are declared as service. So, when an element of service involves apart from sale, the activity falls under the ambit of section 66E, ibid. As per section 65(121) of the Finance Act, 1994, which was in effect up to 30.6.2012, and section 65B (55) applicable w.e.f. 1.7.2012 words and expressions used but not defined in Chapter V and defined in the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise. As per section 2(h) of the Central Excise Act, 1944, "sale" and "purchase", with their grammatical variation and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment of other valuable consideration. The phrase used in the definition is "transfer of possession of goods by one person to another in the ordinary course of trade or business". In trade parlance, transfer of possession of goods is affected at the premises of seller or trader. It was also upheld by the Hon'ble Supreme Court, in the case of **M/s. Escorts JCB Ltd -2002 (146) ELT 31 (SC)** that *"sales took place at the factory gate"*. In this case, since the assessee supplies food to customer premises, which is beyond the place of production of food, by virtue of definition of sale under section 2(h) of

the Central Excise Act, 1994 and as decided by the Hon'ble Supreme Court, it does not construe pure sale; whereas a service element, other than sale is involved in their activity of supply of foods at the premises of customer, and as such carries the activity as mentioned in clause (i) to section 66E, which read as follows:

> *(i) 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.*

11. Learned Authorized Representative (AR) further submits that it is evident that there is no specification of personalized service or serving of food to customer, but the service portion in an activity wherein food supplied (repeat SUPPLIED) in any manner as a part of the activity falls under the ambit of section 66E (i), ibid. The appellant admits that they supply the food and other related items at the premises of customer, as per their requirement, which make it more than a sale, answers supply of food in a premises other than their own. This is the case for the period w.e.f. 01.07.2012. Prior to 01.07.2012 the terms related to 'outdoor catering service' was defined under section 65 as follows:

> *Section 65(24): "caterer' means any person who supplies, either directly or indirectly, any food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements for any purpose or occasion.*

> *Section 65(76a): "outdoor caterer" means a caterer engaged in providing services in connection with catering at a place other than his own but including a place provided by way of tenancy or otherwise by the person receiving such services.*

12. Learned AR further submits that as admitted by the appellant they are 'caterer', as they supply food and other food preparations which answers the definition under section 65(24), ibid. Since they supply the food at a place other than their own, it answers the definition under section 65(76a) of the Finance Act, 1994; and as such chargeable to service tax under the provision of section 65(105) (zzt) read with

section 66 of the Finance Act, 1994. The Adjudication Authority rightly confirmed the demand.

13. Heard both sides and perused the records.

14. We find that prior to 01.07.2012, the activities considered as sale of goods where service tax was not paid by the appellant are falling under the category of 'caterer' as per Section 65(24) of the Finance Act, 1944. However, thereafter from July 2012 onwards as per Section 65E(i), "*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"* is covered under declared service. Free Home Delivery (FHD) activity is undertaken by the Assessee by way of supplying ready to eat food and other articles for human consumption, by carrying out orders placed by their customers at the specified time and at a place requested for delivery. Therefore, the activity involves significant element of service. Hence Free Home Delivery (FHD) activity amounts to provision of taxable service and liable to tax. It is also coming under purview of 'Outdoor Caterer' definition in erstwhile Service Tax law. However as regarding impugned order confirming the demand by invoking the extended period of limitation and imposition of penalty, we find that it is not a fit case for invoking the extended period of limitation since there is no evidence on record to show that the appellant had made any attempt to suppress the facts for evasion of excise duty. Further appellant was registered under the category of 'catering service' and were paying substantial amount of service tax and filing ST-3 returns. Further we find entire allegation is made based on the records maintained by the Appellant and in such cases, demand confirmed by invoking extended period of limitation and penalty are unsustainable; the impugned order is liable to be set aside.

15. In view of the above discussion, impugned order is set aside. The demand is confirmed for the normal period and penalty imposed invoking the extended period of limitation is set aside.

16. Accordingly, the appeal is partially allowed in the above terms.

(Order pronounced in Open Court on 03.09.2026)

(P. A. AUGUSTIAN)
MEMBER (JUDICIAL)

(PULLELA NAGESWARA RAO)
MEMBER (TECHNICAL)

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