IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

Appeal No. ST/75/2011

(Arising out of Order-in-Appeal No.119/2010 (M-III) dated 8.11.2010 passed by the Commissioner of Central Excise (Appeals), Chennai)

M/s. Hotel Priya Appellant

Vs.

Commissioner of GS & Central Excise
Chennai Respondent

Appearance

Shri N. Viswanathan, Advocate for the Appellant
Shri K. Veerabhadra Reddy, JC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing / Decision: **16.08.2018**

Final Order No. **42288 / 2018**

Per Bench

The appellant is aggrieved by the demand of service tax under outdoor catering service.

2. Brief facts are that the appellant is engaged in supply of food to M/s. Mitsubishi Heavy Industries (India) Precision Tools Ltd. Ranipet, (herein after referred to as M/s. Mitsubishi). During verification, it was noticed from the records that the

appellant is engaged in providing catering service to M/s. Mitsubishi from January 2005 onwards. The appellants were raising fortnightly bills on M/s. Mitsubishi for the sale of food for which payments were received by the appellant through cheques. It was also noticed from the accounts of M/s. Mitsubishi that the cost of transportation of food was borne by them. In other words, the appellant had made two separate collections one for supply of food and the other for transportation using separate invoices. According to department, the said activity would fall within outdoor catering service and show cause notice was issued proposing to demand service tax along with interest from January 2005 to March 2007 along with interest and for imposing penalties. After due process of law, the original authority confirmed the demand in the show cause notice along with interest and imposed penalties. In appeal, Commissioner (Appeals) upheld the same. Hence this appeal.

3. On behalf of the appellant, ld. counsel Shri N. Viswanathan opened his argument by adverting to the definition of outdoor catering service under section 65(76a) of the Finance Act, 1994. He submitted that the appellant is running a hotel and they only supply food to M/s. Mitsubishi. It is sale of food and they make their own arrangements for the transportation of the food to M/s. Mitsubishi. The appellants

are not engaged in serving food to the customers in M/s. Mitsubishi. Therefore, the activity is only sale of food and it does not involve any service. He relied upon Board's Circular No. 332/82/97- TRU dated 24.9.197 wherein it has been clarified that sale of food across the counter or mere free delivery or delivery at a nominal cost to cover transportation charges does not fall within the ambit of outdoor catering service. It is also argued by the ld. counsel that in reply to show cause notice, the appellants have categorically stated that the transportation is collected on cost basis only. The appellants do not carry out servicing of food. M/s. Mitsubishi have eight casual labourers working under them for carrying out the activity of serving food to employees / labourers. This fact has not been disputed by the department. The service element in outdoor catering service is catering to the need of the customer which includes serving the food. In the present case, there is only sale of the food which is delivered to the premises of M/s. Mitsubishi. The appellant does not cater to the individual needs of the customers at M/s. Mitsubishi nor do they serve food to the workers there. As such, no service is provided by the appellant. From the bills raised, it can be seen that it is mere sale of food. He relied upon the decision in the case of Tamil Nadu Kalyana Mandapam Association Vs. Union of India – 2004 (167) ELT 3 (SC) wherein in para 55, it is argued by the ld. counsel, that the Hon'ble Supreme Court has observed that outdoor catering service is clearly distinguishable from the service rendered in a restaurant or a hotel. The decision in the case of Ambedkar Institute of Hotel Management Vs. Commissioner of Central Excise – 2015 (40) STR 823 was relied by the counsel to state that only when the activity involves serving of meals, it would be covered under outdoor catering service. In para 1.6 of F. No. 334/3/2011-TRU dated 28.2.2011, the Board has clarified that levy on restaurant service is intended to be confined to the value of services contained in the composite contract and shall not cover either the meal portion or mere sale of food by way of pick-up or home delivery. The appellant is only selling food and delivering it to M/s. Mitsubishi and therefore the said activity would not fall within the outdoor catering service as alleged by the department.

3.1 Without prejudice to the above argument, it is submitted by him that the appellant was under bonafide belief that the transaction was not liable to service tax and has immediately paid the service tax upon investigation much before issuance of the show cause notice and hence no penalty is imposable. He prayed that the appeal may be allowed.

4. The ld. AR Shri B. Balamurugan supported the findings in the impugned order. He submitted that the appellant is not

only preparing the food in his hotel but delivering the goods to the premises of M/s. Mitsubishi. The transportation charges are also collected from M/s. Mitsubishi. It is also seen that the appellant engages in overseeing the activity at the premises of M/s. Mitsubishi. The appellant has raised two separate invoices one for supply of food and another for the transportation charges. Thus has evaded the payment of service tax under outdoor catering service. Since the appellant engages a person to oversee the activity at the premises of M/s. Mitsubishi, there is a service element and therefore the activity squarely falls under the purview of outdoor catering service.

5. Heard both sides.

6. For better appreciation, the definition of outdoor caterer service under section 76(a) is reproduced as under:-

> *"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"*

6.1 The main contention put forward by the ld. counsel for the appellant is that the activity is only sale of foods involving delivery at the premises of M/s. Mitsubishi. It is also stated by them in their reply to the show cause notice that M/s. Mitsubishi has engaged casual labourers for serving food to the employees/workers. In fact, the original authority has held the activity to be outdoor catering service for the mere reason that the brother of the appellant R. Suresh or some other worker of the hotel also go to the company to oversee the activity. The department is of the view that since some person from the hotel goes to the company the activity falls within the definition of outdoor catering. The original authority does not mention what is the overseeing activity done by the brother of the appellant. If one person goes to the premises of the company to check whether the food is sufficient, it can be overseeing the activity of sale of food. But this cannot be considered as catering to the service of the customer. In the decision of Tamilnadu Kalyana Mandapam Association (supra), the Hon'ble Supreme Court had occasion to consider the difference between the service rendered by outdoor caterer and the service rendered in a restaurant / hotel. The Hon'ble Supreme Court observed as under:-

> *"55. In fact, mandap-keepers provide a wide variety of services apart from the service of allowing temporary occupation of mandap. As per Section 65(19) of the Finance Act, 1994, Mandap means any immovable property as defined in Section 3 of the Transfer of Property Act, 1882 and includes any furniture, fixture, light fittings and floor coverings therein let out for consideration for organising any official, social or business function. A mandap-keeper apart from proper maintenance of the mandap, also provides the necessary paraphernalia for holding such functions, apart from providing the conditions and ambience which are required by the customer such as providing the lighting arrangements, furniture and fixtures, floor coverings etc. The services provided by him cover method and manner of decorating and organising the mandap. The mandap-keeper provides the customer with advice as to what should be the quantum and quality of the services required keeping in view of the requirement of the customer, the nature of the event to be solemnized etc. In fact the logistics of setting up, selection and maintenance is the responsibility of the mandap-keeper. The services of the mandap-keeper cannot possibly be termed as a hire purchase agreement of a right to use goods or property. The services provided by a mandap-keeper are professional services which he alone by virtue of his experience has the wherewithal to provide. A customer goes to a mandap-keeper, say a star hotel, not merely for the food that they will provide but for the entire variety of*

services provided therein which result in providing the function to be solemnized with the required effect and ambience. Similarly the services rendered by out door caterers is clearly distinguishable from the service rendered in a restaurant or hotel inasmuch as, in the case of outdoor catering 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 foods 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. In the case of an outdoor caterer, the customer negotiates each element of the catering service, including the price to be paid to the caterer. Outdoor catering has an element of personalized service provided to the customer. Clearly the service element is more weighty, visible and predominant in the case of outdoor catering. It cannot be considered as a case of sale of food and drink as in restaurant. Though the Service Tax is leviable on the gross amount charged by the mandap-keeper for services in relation to the use of a mandap and also on the charges for catering, the Government has decided to charge the same only on 60% of the gross amount charged by the mandap-keeper to the customer."

6.2 Thus, the element personalized service is involved in outdoor catering. In the present case, it is very much clear from the facts that the appellant is merely delivering the food to the company and there is no service element involved. The decision in the case of Ambedkar Institute of Hotel Management (supra) has considered a similar issue, wherein it was observed as under:-

"6. We have considered the submissions of both the sides and perused the record. From the facts stated in the show cause notice as well as in the order-in-original, it is seen that the appellant are preparing the meals as per the fixed menu which are to be served in various schools of Chandigarh Administration under the Mid Day Meal Scheme of the Government. Neither there is any allegation nor there is any evidence to show that the appellant had prepared the meals at the schools where the same were to be served or were in any manner involved in serving the meals. Meals prepared by them are simply supplied at the pre-determined rates to Education Department. The service which is covered under Section 65(105)(zzt) is the service provided or to be provided to any person by an "outdoor caterer" and not by any caterer. The outdoor caterer as defined in Section 65(76a) 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. Since the appellant are preparing mid day meals in their Institute and not in the schools where the meals are served

> *and are not involved in serving of the meals in any manner, in our view they are not covered by the definition of "outdoor caterer" and hence their activity of preparing and supplying meals for mid day scheme would not be covered by the definition of taxable service under Section 65(106(zzt). Accordingly the duty demand on this count would not be sustainable."*

7. From the discussions made above and also from the facts presented before us, we are of the considered opinion that the activity does not fall within the definition of outdoor catering service. The demand therefore cannot sustain. The impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Operative portion of the order was
pronounced in open court)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

Rex